

AGENDA



EUGENE PLANNING COMMISSION

Bascom-Tykeson Room—Eugene Public Library
100 W. 10th Avenue
Eugene, OR 97401

Phone: 541-682-5481
www.eugene-or.gov/pc

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TUESDAY, OCTOBER 2, 2012 – 6:00 P.M.

I. PUBLIC HEARING

LUBA Remand: Goodpasture Island PUD: Off-Site Transportation Improvements (City File WG 10-3, LUBA No. 2011-049)

Public Hearing to consider testimony and evidence related to assignments of error sustained in LUBA's Final Opinion and Order for Willamette Oaks LLC vs. City of Eugene and Goodpasture Partners LLC (LUBA No. 2011-049). Willamette Greenway Permit application is for transportation improvements at the Goodpasture Island Road and Delta Highway interchange, including a new bridge.

Lead City Staff: Steve Ochs, Associate Planner; 541-682-5453
steve.p.ochs@ci.eugene.or.us

Public Hearing Format:

The Planning Commission will receive a brief City staff report followed by an opportunity for public comment. Time limits on testimony may be imposed. The Planning Commission may seek a response to testimony from City staff. The applicant will be allowed a rebuttal period. At the end of the hearing, the Planning Commission Chair will announce whether the record is closed, the record will be held open, or the public hearing will be continued.

Commissioners: Steven Baker; Jonathan Belcher; Rick Duncan; Randy Hledik, Chair; John Jaworski;
Jeffery Mills; William Randall (Vice Chair)

AGENDA ITEM SUMMARY
October 2, 2012

To: Eugene Planning Commission

From: Steve, Ochs, Associate Planner
Gabe Flock, Senior Planner
Emily Jerome, Deputy City Attorney

Subject: LUBA Remand: Goodpasture Island PUD: Off-Site Transportation Improvements
(City File WG 10-3, LUBA No. 2011-049)

ACTION REQUESTED

To hold a public hearing on the remand from the Oregon Land Use Board of Appeals (LUBA) on this application (WG 10-3) and begin deliberations to resolve the assignments of error that were sustained by LUBA and remanded to the Planning Commission for this action.

BRIEFING STATEMENT

The application subject to this appeal is a Willamette Greenway Permit approval for transportation improvements including a new bridge at the Goodpasture Island Road/Delta Highway intersection. In June of 2010, the applicant received tentative PUD and Zone Change approval to construct a 583-unit multi-family development on property located at Goodpasture Island Road and Alexander Loop (see PDT 09-1, TIA 09-4 and Z 09-6). As a means of mitigation for the development's impact to the transportation system, the applicant proposed to construct off-site transportation improvements at the Goodpasture Island Road/Delta Highway interchange. Those proposed improvements were accepted by the City and made a condition of approval. The applicant is now requesting approval to construct these transportation facility capacity improvements to satisfy the conditions of the previous land use application approvals. The improvements to the Goodpasture Island/Delta Highway interchange include a new bridge associated with the widening of Goodpasture Island Road and the widening of interchange approaches. These improvements at the Goodpasture Island Road/Delta Highway interchange are completely within public right-of-way and within the adopted boundaries of the Willamette River Greenway. Their location with respect to the river and its setback (both located within the Greenway) is a key issue on remand.

The Eugene Hearings Official held a public hearing for the subject application on December 15, 2010. The Hearings Official issued a decision conditionally approving the request on February 24, 2011. On March 9, 2011, Willamette Oaks appealed the hearings official's decision to the Planning Commission, asserting twelve assignments of error. After a public hearing and deliberations, on April 25th, 2011 the Planning Commission issued an order affirming the hearings official's decision, with some additional findings. Willamette Oaks then appealed the Planning Commission's order to the Oregon Land Use Board of Appeals (LUBA), asserting six assignments of error. After considering the parties' briefs and oral arguments, LUBA issued an order that affirms parts of the Planning Commission's decision, but remands the matter back to

the Planning Commission for additional findings on two basic issues, discussed below. As LUBA's was a mixed decision, both Willamette Oaks and Goodpasture appealed LUBA's decision to the Court of Appeals. On May 16, 2012, the Court of Appeals affirmed LUBA's decision without issuing an opinion.

REMAND ISSUES

Given the nature of LUBA's remand, the record has been re-opened in order to consider additional evidence specific to the issues on remand. The Planning Commission's role is limited to addressing those issues LUBA remanded. Decisions already made by the Planning Commission and not appealed in the first LUBA appeal, or appealed and affirmed by LUBA, are not subject to a second appeal. Thus, the Planning Commission's role can be divided into two general tasks which are outlined below.

Task1 - Adoption of findings that consider the State's definitions of "Willamette River" and "channel" at ORS 390.310. These findings will either:

- (a) better explain the Hearings Official's and Planning Commission's earlier determination that the Delta Ponds/Debrick Slough area is not part of the Willamette River; or
- (b) change the Planning Commission's earlier determination by now determining that the Delta Ponds/Debrick Slough area *is* part of the River and making different findings and determinations under EC 9.8815(1), (2) and (4) and Metro Plan Policy D-11.¹

Staff recommends that the Planning Commission adopt supplemental findings to their original decision that support the Hearings Official's and Planning Commission's earlier determination that the Delta Ponds/Debrick Slough area is not part of the Willamette River, as explained in option (a) above. LUBA's decision found that the City's conclusion findings were inadequate; not that the City's conclusion was incorrect. The City's decision, that the phrase "the Willamette River" means only the main channel of the Willamette River, did not include consideration of the statutory definition that also refers to other channels as being part of the river. Below is a summary of the previous determinations made by the Hearings Official and Planning Commission, followed by LUBA's remand on this issue.

Also discussed below is the applicant's response to LUBA's remand, which includes an evaluation of the statutory definition with supporting water flow data and a field survey by AKS Engineering and Forestry, LLC. Based on the State's definitions and the evidence provided by

¹ EC 9.8815(1) provides: "To the greatest possible degree, the intensification, change of use, or development will provide the maximum possible landscaped area, open space, or vegetation between the activity and the river." EC 9.8815(2) provides: "To the greatest possible degree, necessary and adequate public access will be provided along the Willamette River by appropriate legal means." EC 9.8815(4) provides: "In areas subject to the Willakenzie Area Plan, the intensification, change of use, or development will conform with that plan's use management considerations." Metro Plan Policy D-11 provides: "[t]he taking of an exception shall be required if a non-water-dependent transportation facility requires placing fill within the Willamette River Greenway setback."

the applicant, staff believes the Planning Commission's earlier conclusion is correct and that the Commission can make additional findings to affirm its original conclusion and resolve this remand issue.

The Hearings Official addressed the issue of the location of the "Willamette River" in relation to the site starting on page 3 of the "Decision of the Hearings Official: Goodpasture Island PUD: Off-site Transportation Improvements (WG 10-3)". The Hearings Official relied on context in the transportation element of the Willakenzie Area Plan, (WAP) which describes bridges and "river crossings" and does not mention the Delta Highway overpass at this location as a "River Crossing". The Hearings Official additionally noted that the WAP labeled only the main channel which runs west and south of the bridge as the "Willamette River" not the area near the bridge.

The Planning Commission (pages 3 and 4 of the Final Order) agreed with the Hearings Official and note in the Final Order that the Hearings Official correctly interpreted that the term "the river" refers to only the current channel of the Willamette River not to a (possible) former channel of the river.

LUBA's decision (see LUBA's Final Order, p. 12-14) found that the WAP transportation element relied on by the City is not "particularly persuasive context for ascertaining the meaning of the phrase 'the Willamette River' and 'the river' as used in the city's ordinance implementing Goal 15." LUBA's decision found the City's conclusion, that the phrase "the Willamette River" means only the main channel of the Willamette River, may not be consistent with the statutory definition as including other channels of the river and fails to consider whether the Delta Ponds/Debrick Slough is a "channel" of the river based on the statutory definition at ORS 390.310.

LUBA's decision noted that because the City's Willamette Greenway criteria implement Goal 15, the use of the word "river" in the implementing provisions should have the same meaning as the term is used in Goal 15. ORS 390.310, part of the Willamette Greenway statutes provides a definition of "Willamette River".

Definitions for ORS 390.310 to 390.368. As used in ORS 390.310 to 390.368, unless the context requires otherwise:

"(3) 'Willamette River' means that portion of the Willamette River, including all channels of the Willamette River, from its confluence with the Columbia River upstream to Dexter Dam and the Coast Fork of the Willamette River upstream the Cottage Grove Dam."

LUBA also notes that "Channel" is defined at ORS 390.310(1) as including "***any channel that flows water at ordinary low water mark". They note that these definitions provide more relevant context than relied on by the City. LUBA concludes this issue by noting the City should consider the statutory definitions in determining whether the Delta Ponds/Debrick Slough is part of the "Willamette River".

On September 11, 2012, in response to LUBA's remand on this issue, the applicant provided

additional information regarding “whether the Delta Ponds/Debrick Slough is part of the Willamette River as defined in ORS 390.310.”

The applicant provided a letter from AKS Engineering and Forestry, LLC (AKS) along with photographs noting (and depicting) that as of August 21, 2012, there is no water flowing from the Willamette River to Delta/Ponds Debrick Slough (see page 4 of the applicant’s Findings of Fact and Exhibits 1-3). A field survey was also provided by AKS, which shows that the closest observed connection point was surveyed at an elevation 1.47 feet higher than the ordinary low water line of the Willamette River. Based on this information, the applicant notes that the Delta Ponds/Debrick Slough is not connected to the “Willamette River” at ordinary low water and therefore is not “channel” as defined in ORS 390.310.

The applicant provides additional information regarding the historic use of the Delta Ponds/Debrick Slough (page 6 of the applicant’s Findings of Fact and Exhibit 4), including: 1) how the area was a gravel mine that was used in part to construct the Delta Highway and Beltline Road; 2) information regarding the ownership of the Delta Ponds and how the ownership is not consistent with the ownership of rivers, as the state typically holds title to all river beds, whereas the City owns the ponds; and 3) information from the City’s Delta Ponds Plan that notes the City reestablished a hydrologic connection between the Willamette River and the Delta Ponds during Winter high water, but does not connect at ordinary low water.

In response to LUBA’s remand on this issue, staff recommends that the Planning Commission adopt additional findings that consider the State’s definitions of “Willamette River” and “channel” at ORS 390.310. These findings would rely on the information and findings provided by the applicant and would conclude that, as the Delta Ponds/Debrick Slough do not flow water at ordinary low water, they are not a “Channel” as defined at ORS 390.310(1) and, therefore, are not included in the statutory definition of “Willamette River” at ORS 390.310. The additional findings could also rely on the evidence provided by the applicant regarding the history of the area as further evidence that the Delta Ponds are not part of the “Willamette River”.

If the Planning Commission affirms its original conclusion (with additional findings) that the Delta Ponds/Debrick Slough are not a part of “the river,” no additional findings will be required under EC 9.8815(1), (2) and (4) and Metro Plan Policy D-11, as the original findings in relation to these criteria were based on the conclusion that “the river” did not include the Delta Ponds/Debrick Slough area.

Task 2 - Adoption of supplemental findings that either:

- (a) better explain the Hearings Official and Planning Commission’s determination that transportation improvements to the un-zoned Delta Highway right-of-way are not subject to the Metro Plan description of the Parks and Open Space land use designation (Metro Plan II-G-9), Metro Plan policy H-1, plan provisions related to parks and open space; and, a Willakenzie Area Plan (WAP) goal that references the protection and enhancement of land designated park and open

space in the Metro Plan. (WAP, p.6.); or,

- (b) change the Planning Commission's decision by now determining that those parks and open space plan provisions *do* apply and by making findings addressing them.

Staff recommends the Planning Commission adopt supplemental findings that explain the Hearings Official's and Planning Commission's previous determination, as explained in option (a) above. LUBA stated that they did not understand the City's determination, as cited below.

*We do not understand why the city determined that the proposal does not need to be consistent with the Metro Plan open space policies or the WAP's open space policies, or what the city thought was the significance, if any, of the fact that the property is unzoned. The fact that the right-of-way is unzoned does not necessarily mean that Metro Plan and WAP policies applicable to the proposed development of land designated Open Space and Parks do not apply. **There may be other reasons why the Metro Plan and WAP goals and policies cited by Willamette Oaks either do not apply to the proposed development or do not apply in the way that Willamette Oaks suggests**, but neither the decision nor the response briefs cite any such reasons. Accordingly, remand is necessary for the city to consider whether any Metro Plan and WAP goals and policies apply to the proposed development, and if so, whether the development is consistent with such goals and policies. [LUBA Final Order pp. 24-25, emphasis added in **bold**]*

LUBA's decision found that there is insufficient information in the record to explain why the Hearings Official and Planning Commission determined that the Metro Plan and WAP policies on open space are not applicable to the subject Willamette Greenway Permit. Staff believes that the Hearings Official and Planning Commission were correct in their determination, but that supplemental findings are necessary to resolve this matter on remand. Based on the Willamette Greenway permit requirements, staff also believes that the Planning Commission can sufficiently explain why the policies cited by Willamette Oaks are not applicable.

One reason for inapplicability is not the un-zoned status of the right-of-way, but that the Metro Plan and Willamette Greenway Permit approval criteria in the City's code are intentionally designed to limit the scope of which plan provisions (both Metro Plan and WAP) are to be considered. The approval criteria that invoke plan provisions read as follows, with emphasis added:

EC 9.8815(3): The intensification, change of use, or development will conform with applicable **Willamette Greenway policies** as set forth in the Metro Plan.

EC 9.8815(4): In areas subject to the Willakenzie Area Plan, the intensification, change of use, or development will conform with **that plan's use management considerations**.

The Willamette Greenway policies set forth in the Metro Plan referenced in the approval

criterion EC 9.8815(3), are listed in the Willamette River Greenway, River Corridors, and Waterways Element (pages III-D-4 and III-D-5, Metro Plan), an excerpt of which is included as Attachment A. The “use management considerations” in the Willamette Greenway are listed on pages 155 and 156 of the WAP and provided in Attachment B. It is important to note that the Willamette Greenway approval criteria do not point to other policies or require compliance with the Metro Plan diagram.

The language included within the Willamette Greenway Permit approval criteria cited above specifically limit the range of policies to be considered. This language is distinct from approval criteria for various other application types which clearly invoke a broader set of plan provisions including the land use diagram and other provisions. For example, the zone change approval criteria (with emphasis added) illustrate this point:

EC 9.8865(1): The proposed zone change is consistent with ***applicable provisions of the Metro Plan***. The written text of the plan shall take precedence over the Metro Plan diagram where apparent conflicts or inconsistencies exist.

EC 9.8865(2): The zone change is consistent with ***applicable adopted refinement plans***. In the event of inconsistencies between these plans and the Metro Plan, the Metro Plan shall prevail.

Necessarily, the zone change approval criteria require a broader analysis of not only the designations established on the Metro Plan diagram, but other potentially applicable “provisions”. As other zone change case history before the Hearings Official, Planning Commission, and LUBA instructs, these “provisions” in some cases may also include adopted policies, and sometimes other less specific goals and findings which are relevant and must be considered in the City’s decision, depending on the context and relevant facts in a given application. Similarly, the zone change approval criteria also require consistency with “applicable adopted refinement plans” which is even less specific as to which plan provisions may apply in a given case.

Unlike zone changes, the approval criteria for Willamette Greenway Permits invoke a much narrower scope of review, specific to only the Metro Plan “Willamette Greenway policies” and the WAP “use management considerations” for the Willamette Greenway, as cited above. To help illustrate this point, staff further notes that other application types, such as site reviews at EC 9.8445(6), only require compliance with applicable adopted plan policies which are codified at EC 9.9500.

Thus, while in some cases it may be necessary to review the text and context of a given plan provision to determine the extent of its relevance or applicability as part of the approval criteria, the City’s code provides initial direction which must first be considered to determine if the plan provision applies at all. With the City’s code language as the starting point, it is clear in this case that the policies and goals raised by the opponents are not applicable under the approval criteria for Willamette Greenway permits at EC 9.8815. It is the express language of the approval criteria in relation to the Metro Plan and WAP which, in part, resolves this matter,

rather than the fact that the existing right-of-way is un-zoned, as relied upon in prior decisions. Staff therefore recommends that the Planning Commission adopt findings to this effect, in order to resolve the issue on remand.

Even so, as this issue relates to the requirements of ORS 197.175(2)(d) in the context of LUBA's decision (see LUBA Final Order at footnote 15, p.24), it can be found based on the record materials and the applicant's additional findings provided on remand, that the opponents have not demonstrated any inconsistency with provisions of the Metro Plan or WAP that are outside the intentionally narrow scope of the Willamette Greenway Permit approval criteria in the City's code. Therefore, staff recommends that the Planning Commission also adopt the applicant's findings regarding this issue on pages 9-22 of the Applicant's Findings of Fact. These findings follow the analytical steps LUBA has established for local government to apply in determining whether a local comprehensive plan provision is an independent mandatory approval criterion applicable to an individual land use application.

The applicant steps through the policy language in each instance and correctly concludes that these policies are either inapplicable, or otherwise satisfied, in the context of this quasi-judicial land use application process. The applicant's findings conclude that Policy H-1, additional "Parks and Recreation Facilities Element policies" and WAP goals are in some cases aspirational, or in some cases planning directives to the City, but cannot be used as independent approval criteria to the application. The applicant provides findings to show that even if the policies are applicable to this application as Willamette Oaks asserts, the proposal is consistent with the policies.

STAFF RECOMMENDATION

Based on the available evidence to date, and consistent with the preceding findings including specific clarifications in response to the LUBA issues remanded, staff recommends that the Planning Commission, after future deliberation, take action to adopt supplemental findings as summarized below in the form of a revised final order.

In regards to "Task 1", the "Willamette River" issue described above, these findings would consider the State's definitions of "Willamette River" and "channel" at ORS 390.310 and rely on evidence provided by the applicant regarding flow at "ordinary low water" as well as the history of the area to support the Planning Commission's original conclusion that the Delta/Ponds Debrick Slough are not a "channel" of the Willamette River.

In regards to "Task 2", the "Parks and Open Space" issue described above, staff recommends the adoption of supplemental findings that explain the Hearings Official and Planning Commission's determination that transportation improvements are not subject to the Metro Plan and WAP provisions regarding parks and open space, not because they are un-zoned but rather, because the Metro Plan and the Willamette Greenway Permit approval criteria do not subject this application to compliance to those provisions; and, even if they are found to be applicable, they are satisfied. Staff further recommends the Planning Commission adopt the applicant's findings which analyze these policies, describe how they are not applicable to the proposal and find that even if they are applicable they are met by this application.

With these additional findings, staff recommends that the Planning Commission affirm the original decision of the Planning Commission on remand from LUBA for Goodpasture Island PUD: Off-Site Transportation Improvements (WG 10-3).

ATTACHMENTS

- A. LUBA Final Opinion and Order
- B. Planning Commission Final Order
- C. Hearings Official Decision
- D. Metro Plan Policies Excerpt
- E. Applicable Willakenzie Area Plan Policies

The record is available for review at the Eugene Planning Division offices. The record will also be made available for review at the Planning Commission meeting.

FOR MORE INFORMATION:

Please contact Steve Ochs, Eugene Planning Division, by phone at (541) 682-5453, or by e-mail at steve.p.ochs@ci.eugene.or.us

BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

WILLAMETTE OAKS LLC,
Petitioner,

vs.

LANE COUNTY,
Respondent,

and

GOODPASTURE PARTNERS, LLC
Intervenor-Respondent.

LUBA No. 2011-019

WILLAMETTE OAKS LLC,
Petitioner,

vs.

CITY OF EUGENE,
Respondent,

and

GOODPASTURE PARTNERS, LLC
Intervenor-Respondent.

LUBA Nos. 2011-020 and 2011-049

FINAL OPINION
AND ORDER

Appeals from Lane County and City of Eugene.

Zack P. Mittge, Eugene, filed the petition for review and argued on behalf of petitioner. With him on the brief was Hutchinson, Cox, Coons, DuPriest, Orr & Sherlock PC.

Stephen L. Vorhes, County Counsel, Eugene, filed a joint response brief on behalf of respondent Lane County.

Emily N. Jerome, Eugene City Attorney, Eugene, filed a joint response brief on behalf

1 of respondent city of Eugene.

2
3 Michael C. Robinson and Seth J. King, Portland, filed the response brief and argued
4 on behalf of intervenor-respondent. With them on the brief was Perkins Coie LLP.

5
6 RYAN, Board Chair; BASSHAM, Board Member; HOLSTUN, Board Member,
7 participated in the decision.

8
9 LUBA NOS. 2011-019/020 12/06/2011
10 TRANSFERRED

11
12 LUBA NO. 2011-049 12/06/2011
13 REMANDED

14
15 You are entitled to judicial review of this Order. Judicial review is governed by the
16 provisions of ORS 197.850.

NATURE OF THE DECISIONS

In LUBA Nos. 2011-019 and 2011-020, Willamette Oaks, LLC (Willamette Oaks) appeals decisions by the city and the county that authorize Goodpasture Partners, LLC (Goodpasture) on behalf of the city and county to apply to the city for a Willamette Greenway Permit to construct off-site transportation improvements on property that is owned in part by the city and in part by the county.

In LUBA No. 2011-049, Willamette Oaks appeals the city's decision approving Goodpasture's Willamette Greenway Permit application.

REPLY BRIEF

Willamette Oaks moves for permission to file a reply brief to respond to new matters raised in the response briefs. The reply brief is allowed.

FACTS

A previous city decision approved Goodpasture's application for a zone change and planned unit development to construct a 583-unit multi-family development on its 23-acre property located at the intersection of Goodpasture Island Road and Alexander Loop, east of the main channel of the Willamette River. That city decision required as a condition of its approval of the zone change that Goodpasture widen the existing Goodpasture Island Road bridge over Delta Highway, and construct a new bridge over Delta Highway located northeast of the existing bridge.¹

¹ The condition provided:

"Mitigation #2 – Goodpasture Island Road Bridge – Widen Goodpasture Island Road to include dual left-turn lanes from Goodpasture Island Road to Northbound Delta Highway by: (a) constructing a second bridge structure north of the existing Goodpasture Island bridge over Delta Highway, such that the existing bridge would accommodate eastbound travel and the new bridge would accommodate westbound travel; (b) widening Goodpasture Island Road east of the existing bridge to provide four travel lanes that would accommodate two eastbound left-turn lanes and single through lanes in each direction; (c) widening the northbound Delta Highway on-ramp to two lanes to facilitate the two left-turn lanes and a lane drop to merge

1 Those transportation facility improvements will be located on city and county owned
2 property adjacent to the Delta Ponds wetlands, Debrick Slough, and the Goodpasture
3 wetlands. The main channel of the Willamette River is located approximately 3,000 feet to
4 the west of the subject property. Debrick Slough joins the Willamette River north of the
5 project site.

6 Goodpasture applied to the city for a Willamette Greenway Permit to construct the
7 off-site transportation improvements, and the hearings officer approved the application.
8 Willamette Oaks appealed the hearings officer's decision to the planning commission, which
9 affirmed the hearings officer's decision, incorporating the hearings officer's decision and
10 adopting additional findings in support of its decision. This appeal followed.

11 **MOTIONS TO DISMISS LUBA NOS. 2011-019 AND 2011-020/SEVENTH**
12 **ASSIGNMENT OF ERROR (LUBA NO. 2011-049)**

13 **A. Introduction**

14 Eugene Code (EC) 9.7010 provides:

15 "Applications shall be submitted on a form approved by the city manager, be
16 accompanied by a fee established pursuant to EC Chapter 2 *and be signed by*
17 *the property owner, unless the applicant is a public agency, in which case the*
18 *signature of the property owner is not required. * * *."*

19 The proposed transportation improvements would be located on city and county owned
20 property, but the city and county were not listed as "applicants," and the application did not
21 initially include the signature of a city and county official.² In August 2010, Goodpasture
22 submitted its application for a Willamette Greenway Permit. On November 1, 2010, the city
23 deemed the application complete. In January, 2011, Goodpasture submitted into the record

traffic into a single lane in advance of the existing weaving area; (d) tapering Goodpasture Island Road to the existing width; and (e) installing traffic signal modifications to accommodate the proposed roadway changes." Record 711.

² Under EC 9.7010, listing the city and county as applicants would obviate any need for city and county signatures on the application.

1 authorizations from the city engineer, the acting county administrator and the director of the
2 county public works department that authorized Goodpasture to submit the application on the
3 city's and county's behalf as the "property owner[s]" under EC 9.7010. Record 253-254.

4 Willamette Oaks then appealed the city and county authorizations to LUBA in LUBA
5 Nos. 2011-019 and 2011-020. The city and Goodpasture moved to dismiss LUBA Nos.
6 2011-019 and 2011-020 because, they argued, the city and county authorizations are not
7 "land use decisions" within the meaning of ORS 197.015(10)(a) and also do not qualify as
8 "significant impact" land use decisions as described in *City of Pendleton v. Kerns*, 294 Or
9 126, 133-34, 653 P2d 996 (1982).³ We suspended LUBA Nos. 2011-019 and 2011-020 in
10 order to consider the motions to dismiss.

11 Willamette Oaks subsequently appealed the city's decision approving Goodpasture's
12 Willamette Greenway Permit application in LUBA No. 2011-049. In an order dated May 31,
13 2011, we consolidated LUBA Nos. 2011-019, 2011-020 and 2011-049 and stated that we
14 would decide all three appeals at the same time.

15 **B. Motions to Dismiss**

16 The city and Goodpasture move to dismiss and point out that although the
17 authorizations state that they are being executed "pursuant to EC 9.7010," neither
18 authorization contains any findings by the local government employee signing the

³ As relevant here, LUBA's jurisdiction is limited to "land use decisions." ORS 197.015(10)(a)(A) defines "land use decision" to include:

"A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:

"(i) The goals;

"(ii) A comprehensive plan provision;

"(iii) A land use regulation; or

"(iv) A new land use regulation[.]"

1 authorization that the authorizations themselves satisfy EC 9.7010 or any other provisions of
2 applicable law, nor were they required to adopt such findings. It follows, they argue, that the
3 authorizations therefore do not concern the “application” of EC 9.7010 or any other land use
4 standard within the meaning of ORS 197.010(10)(a)(A)(iii).

5 In its petition for review, Willamette Oaks repeats its contention that LUBA has
6 jurisdiction over the appeals of the city and county authorizations because they are land use
7 decisions. Willamette Oaks responds that the city and county authorizations to Goodpasture
8 to file the Greenway permit application are land use decisions as described in ORS
9 197.015(10)(a)(A), because the authorizations apply or were required to apply land use
10 regulations and are the city and county’s final decisions on whether to authorize the permit
11 application. According to Willamette Oaks, both authorizations refer to EC 9.7010 and
12 therefore in executing the authorizations, the city engineer, the acting county administrator
13 and the public works department director applied a land use regulation – EC 9.7010.
14 Additionally, Willamette Oaks argues that the county employees who signed the county
15 authorization were required to but did not apply provisions of the county’s Transportation
16 System Plan to the authorization. Finally, Willamette Oaks argues in the alternative that the
17 authorizations are “significant impact” land use decisions under *Kerns*.

18 We agree with the city and Goodpasture that the authorizations are not “land use
19 decisions” within the meaning of ORS 197.015(10)(a)(A). Although 9.7010 is referenced in
20 the authorizations and as a provision of the EC is a “land use regulation,” it does not “contain
21 provisions that are standards or criteria for making the challenged decision” and therefore the
22 authorizations do not “concern” the application of a land use regulation. *Knee Deep Cattle*
23 *Company, LLC v. Lane County*, 28 Or LUBA 288, 298 (1994), *aff’d* 133 Or App 120, 890
24 P2d 449 (1995). The city and county authorizations were executed by the respective city and
25 county officials when Goodpasture asked the city and county in their capacities as property
26 owners to demonstrate that Goodpasture was authorized to file an application to construct

1 improvements on city and county owned properties.⁴ The authorizations do not apply any
2 comprehensive plan provision or land use regulation as approval criteria.⁵ Willamette Oaks
3 has not pointed to any requirement in the EC that required the city engineer to apply a land
4 use regulation to his decision to authorize Goodpasture to apply for the Greenway permit on
5 the city's behalf, or in the Lane County Code (LCC) that required the county employees who
6 executed the authorization to apply any provisions of the LCC, or the county's Transportation
7 System Plan to their decision to authorize Goodpasture to apply for the Greenway permit.
8 We also agree with the city and Goodpasture that the authorizations are not "significant
9 impact" land use decisions under *Kerns*. While the outcome of the Greenway permit
10 proceeding will significantly affect land uses on the property, Willamette Oaks has not
11 pointed to any significant impact on present or future land uses from the *execution of the*
12 *authorizations* to allow Goodpasture to apply for the Greenway permit.

13 **C. Motion to Transfer**

14 Willamette Oaks filed a precautionary motion under OAR 661-010-0075(11) to
15 transfer LUBA Nos. 2011-019 and 2011-020 to circuit court in the event LUBA determines it
16 does not have jurisdiction over the appeals.⁶ Goodpasture objects to the motion to transfer,

⁴ Whether the respective signers had the authority to execute the authorizations is the subject of Willamette Oaks' fourth and seventh assignments of error.

⁵ Further, it is doubtful whether the county either "applied" EC 9.7010 or was required to apply EC 9.7010, since EC 9.7010 is a city provision, not a county provision.

⁶ OAR 661-010-0075(11) provides:

"(11) Motion to Transfer to Circuit Court:

"(a) Any party may request, pursuant to ORS 34.102, that an appeal be transferred to the circuit court of the county in which the appealed decision was made, in the event the Board determines the appealed decision is not reviewable as a land use decision or limited land use decision as defined in ORS 197.015(10) or (12).

"(b) A request for a transfer pursuant to ORS 34.102 shall be initiated by filing a motion to transfer to circuit court not later than 14 days after the date a respondent's brief or motion that challenges the Board's jurisdiction is filed. If the Board raises a jurisdictional issue on its own motion, a motion to transfer to circuit court shall be

1 arguing that the authorizations are not “final” decisions and no purpose would be served by
2 transferring a non-final decision to circuit court. In support, Goodpasture cites *Grabhorn v.*
3 *Washington County*, 46 Or LUBA 672 (2004). However, in *Grabhorn*, we concluded that the
4 challenged decision, a letter that announced that the local government will reconsider its
5 original decision, and identified a future decision on reconsideration as the final appealable
6 decision, rendered the original decision a tentative, non-final decision that is not within
7 LUBA’s jurisdiction. In the present case, however, the city and county authorizations appear
8 to have been provided to Goodpasture independent of the land use process that culminated in
9 the approval of the Greenway permit, and to be the respective local governments’ last word
10 on whether to authorize Goodpasture to apply for the Greenway permit on city and county
11 owned property. In that respect, they differ considerably from the decision in *Grabhorn* that
12 we found was an intermediate step in the land use proceeding.

13 Accordingly, Willamette Oaks’ motion to transfer LUBA Nos. 2011-019 and 2011-
14 020 is granted, and LUBA Nos. 2011-019 and 2011-020 are bifurcated from LUBA No.
15 2011-049. We therefore do not reach Willamette Oaks’ seventh assignment of error, which
16 argues that the authorizations must be reversed because the city and county employees who
17 signed the authorizations lacked the authority to authorize Goodpasture to apply for the
18 Willamette Greenway permit to construct the improvements on city and county owned
19 property.

filed not later than 14 days after the date the moving party learns the Board has raised
a jurisdictional issue.

- “(c) If the Board determines the appealed decision is not reviewable as a land use
decision or limited land use decision as defined in ORS 197.015(10) or (12), the
Board shall dismiss the appeal unless a motion to transfer to circuit court is filed as
provided in subsection (11)(b) of this rule, in which case the Board shall transfer the
appeal to the circuit court of the county in which the appealed decision was made.”

1 **FIRST, SECOND, AND SIXTH ASSIGNMENTS OF ERROR (LUBA No. 2011-049)**

2 **A. Introduction**

3 Statewide Planning Goal 15 (Willamette River Greenway) requires that local
4 governments map the boundaries of the Willamette River Greenway and develop a plan to
5 manage land uses within the Greenway.⁷ The Eugene-Springfield Metropolitan Area General
6 Plan, known as the Metro Plan, adopted a map of the city's greenway boundaries, and the
7 Land Conservation and Development Commission acknowledged those boundaries in 1982.
8 Metro Plan, III-D-1. The subject property is located within the Greenway boundary. The
9 city also adopted a refinement plan for the area of the city in which the property is located,
10 known as the Willakenzie Area, that is called the Willakenzie Area Plan (WAP).

11 The city's program for managing land uses within the Greenway boundary is found at
12 EC 9.8800 *et seq.*⁸ EC 9.8815 provides in relevant part:

⁷ The Court of Appeals recently summarized the requirements embodied in Statewide Planning Goal 15 (Willamette River Greenway):

"[T]he Oregon Legislature in 1973 declared it to be 'in the public interest to develop and maintain a natural, scenic, historical and recreational greenway upon lands along the Willamette River to be known as the Willamette River Greenway.' ORS 390.314(1). Statewide Planning Goal 15, which specifically pertains to the Willamette River Greenway, requires that local governments develop and implement a plan for (1) establishing the Greenway boundary, (2) managing uses of lands within the Greenway, and (3) acquiring land to serve the purposes of the Greenway. OAR 660-015-0005; Goal 15, Paragraph A(2) (Greenway Program shall 'be composed of cooperative local and state government plans for the protection, conservation, enhancement and maintenance of the Greenway * * *')." *Gunderson v. City of Portland*, 243 Or App 612, 615-16, 259 P3d 1007 (2011).

⁸ EC 9.8800 provides:

"Purpose of Willamette Greenway Permits. Intensification of uses, changes in use, or developments require special consideration before being permitted within the boundaries of the Willamette River Greenway. Special consideration is required to implement Oregon Statewide Planning Goal 15, Willamette River Greenway which is designed to protect, conserve, enhance, and maintain the natural, scenic, historical, agricultural, economic, and recreational qualities of lands along the Willamette River. Urban uses may be allowed but conditions of approval may be imposed as are deemed necessary to carry out the purpose and intent of the Willamette River Greenway, and to insure that any intensification of uses, changes in use, or developments within the Willamette Greenway boundaries are compatible with nearby uses within the Willamette Greenway."

1 **“Willamette Greenway Permit Approval Criteria and Standards.**

2 Willamette Greenway permit approval may be granted only if the proposal
3 conforms to all the criteria in subsections (1) through (4), and the applicable
4 standards of subsection (5) as follows:

5 “(1) To the greatest possible degree, the intensification, change of use, or
6 development will provide the maximum possible landscaped area,
7 open space, or vegetation between the activity and the river.

8 “(2) To the greatest possible degree, necessary and adequate public access
9 will be provided along the Willamette River by appropriate legal
10 means.

11 “(3) The intensification, change of use, or development will conform with
12 applicable Willamette Greenway policies as set forth in the *Metro*
13 *Plan*.

14 “(4) In areas subject to the Willakenzie Area Plan, the intensification,
15 change of use, or development will conform with that plan’s use
16 management considerations. * * *”

17 The language in EC 9.8815(1) and (2) is nearly identical to language in Goal
18 15(F)(3)(b)(1) and (2).

19 One of the Metro Plan policies referenced in EC 9.8815(3) that applies to the
20 proposed transportation improvements is Metro Plan Policy D-5, which provides that “[n]ew
21 development that locates along river corridors and waterways shall be limited to uses that are
22 compatible with the natural, scenic, and environmental qualities of those water features.”
23 The second applicable Metro Plan policy referenced in EC 9.8815(3) is Policy D-11, which
24 provides that “[t]he taking of an exception shall be required if a non-water-dependent
25 transportation facility requires placing fill within the Willamette River Greenway setback.”

26 **B. The City’s Decision**

27 In considering whether the application satisfies various approval criteria, the hearings
28 officer and planning commission initially concluded that the phrase “the Willamette River”
29 and its shorthand term “the river” as used in various provisions of the Metro Plan and WAP
30 Willamette River Greenway policies and the EC refer to the main channel of the Willamette
31 River, which, as noted, is approximately one-half mile to the west of the subject property. In

1 evaluating the meaning of the "Willamette River," the hearings officer first noted that the EC
2 does not define "the Willamette River." He explained that "[a]t its closest point the existing
3 channel of the Willamette River is approximately 3,200 feet (0.6 miles) to the southwest of
4 the project site." Record 17. He next looked to provisions of the transportation element of
5 the WAP as relevant context for interpreting the phrase "the Willamette River." He noted
6 that the transportation element of the WAP describes "river crossings," that the transportation
7 element does not mention the existing bridge over Delta Highway as a "river crossing," and
8 that the transportation element base map contains a notation delineating the location of the
9 "Willamette River" that appears only over the main channel of the river. The hearings officer
10 concluded that "[c]ontext indicates that the term 'the river' refers to only the current channel
11 of the Willamette River." *Id.* He also relied on staff testimony that the city has previously
12 applied the criteria at EC 9.8815(1)-(4) to the "current channel of the Willamette River, not
13 to former channels." Record 18. He concluded that "[b]ased on all of this context, the
14 hearing official concludes that the term 'the river' as used in this criterion refers to the
15 mainstem of the Willamette River, not to former channels." *Id.*

16 The planning commission adopted the hearings officer's findings and adopted
17 additional findings that:

18 "[t]he hearings official correctly interprets the term 'the river' to refer only to
19 the current channel of the Willamette River not to a (possible) former channel
20 of the river as the appellant asserts. While [Willamette Oaks] refers to
21 'former river channels' and various reaches of the Willamette River
22 throughout the testimony, [Willamette Oaks] has not provided evidence
23 establishing that the project location is in the area of a former river channel."
24 Record 6-7.

25 C. Assignments of Error

26 The city relied on its construction of the phrase "the Willamette River" as referring
27 only to the main channel of the Willamette River that is located approximately one-half mile
28 from the subject property to conclude that numerous provisions of the EC and the Metro Plan
29 were met. In its first, second, and sixth assignments of error, Willamette Oaks argues that the

1 city's misconstruction of the phrase "the Willamette River" as referring only to the main
2 channel of the Willamette River means that it erred in finding that EC 9.8815(1) was met, EC
3 9.8815(3) and Metro Plan Policies D-5 and D-11 were met, and that EC 9.8815(2) and (4) did
4 not apply.⁹ According to Willamette Oaks, the Delta Ponds/Debrick Slough area that is
5 located east of the subject property is part of the Willamette River.

6 Willamette Oaks also argues that the provisions of the WAP that the hearings officer
7 relied on are not relevant context for determining what the "Willamette River" means,
8 because the Greenway protections embodied in the city's ordinances implementing Goal 15
9 have no substantive or meaningful relationship to the WAP's transportation element's
10 description of "river crossings" or to the maps contained in the WAP's transportation element
11 that label the Willamette River. Willamette Oaks also argues that the fact that the position
12 that staff may have taken in the past regarding the meaning of "the Willamette River" does
13 not provide support for the hearings officer's decision. The city and Goodpasture
14 (respondents) respond that the city's determination that "the Willamette River" means the
15 main channel of the Willamette River is correct.

16 We review the city's interpretation to determine whether it is correct. *McCoy v. Linn*
17 *County*, 90 Or App 271, 275, 752 P2d 323 (1988). Initially, we agree with Willamette Oaks
18 that the provisions of the WAP's transportation element cited and relied on by the city are not
19 particularly persuasive context for ascertaining the meaning of the phrase "the Willamette
20 River" and "the river" as used in the city's ordinance implementing Goal 15. The WAP
21 provisions referred to by the hearings officer are the city's decision on how transportation
22 uses and improvements within the Willakenzie area should be planned and managed, but
23 those provisions do not appear to consider transportation uses and improvements in relation

⁹ In its first assignment of error, Willamette Oaks challenges the city's finding that EC 9.8815(1) is met. In its second assignment of error, Willamette Oaks challenged the city's finding that EC 9.8815(3) and Metro Plan Policies D-5 and D-11 are met. In its sixth assignment of error, Willamette Oaks challenges the city's findings that EC 9.8815(2) and (4) do not apply.

1 to the Greenway protections that are embodied in the city's Goal 15 program. We also agree
2 with Willamette Oaks that past practices of city staff in evaluating greenway permit
3 applications are not particularly helpful in ascertaining the meaning of the term.

4 As explained above, EC 9.8815 implements the statutory requirement in Goal 15 that
5 the city manage land uses within the Willamette River Greenway, and the criteria at EC
6 9.8815(1) are the same as the implementation measures of Goal 15. The use of the word
7 "river" in city provisions implementing Goal 15 has the same meaning as that term is used in
8 Goal 15. Goal 15 does not include a definition of "Willamette River," but the Goal requires
9 review of uses within the Greenway boundary to ensure compatibility with the Willamette
10 River Greenway statutes, at ORS 390.310 to 390.368. ORS 390.310, part of the Willamette
11 River Greenway Statutes, provides a definition of "Willamette River:"

12 **"Definitions for ORS 390.310 to 390.368.** As used in ORS 390.310 to
13 390.368, unless the context requires otherwise:

14 "(3) 'Willamette River' means that portion of the Willamette River,
15 *including all channels of the Willamette River*, from its confluence with the
16 Columbia River upstream to Dexter Dam and the Coast Fork of the
17 Willamette River upstream to Cottage Grove Dam." (Bold in original, italics
18 added.)

19 "Channel" is also defined at ORS 390.310(1) as including "* * * any channel that flows
20 water at ordinary low water." At a minimum, those definitions appear to provide more
21 relevant context than the context cited and relied on by the hearings officer and planning
22 commission, which must be considered in interpreting the term "river" as used in the city's
23 ordinances implementing Goal 15, if indeed those statutory definitions do not directly control
24 the meaning of that term. The city's conclusion that the phrase "the Willamette River" (or
25 the shorthand term "the river") means only the main channel of the Willamette River located
26 to the west of the subject property does not appear to be consistent with the statutory
27 definition of "Willamette River" as including channels of the river, and fails to consider
28 whether the Delta Ponds/Debrick Slough is a "channel" of the Willamette River, as defined

1 by ORS 390.310(1), and thus part of the Willamette River. We note that there is some
2 evidence in the record indicating that water in the Debrick Slough flows throughout the year,
3 but that evidence does not identify whether the water flows at “ordinary low water.” Record
4 425, 872. On remand, the city should consider the statutory definitions and determine
5 whether under those definitions the Delta Ponds/Debrick Slough is part of the “Willamette
6 River.”

7 **1. EC 9.8815(1), (2) and (4)**

8 As noted, the city concluded that “the Willamette River” refers only to the main
9 channel of the Willamette River, and found that, as relevant here, EC 9.8815(1) is met and
10 that EC 9.8815(2) and (4) do not apply.¹⁰ For the reasons explained above, we agree with
11 Willamette Oaks that remand is necessary for the city to reconsider whether the slough area is
12 a “channel” and hence part of the “river” for purposes of Goal 15 and EC 9.8815.

13 **2. EC 9.8815(3) - Metro Plan Policy D-11**

14 EC 9.8815(3) provides that a Greenway permit may be approved if “[t]he
15 intensification, change of use, or development will conform with applicable Willamette

¹⁰ The hearings officer found that EC 9.8815(1) is satisfied, and the planning commission adopted his findings. Record 6-7, 18. Regarding EC 9.8815(2), the hearings officer found in relevant part:

“As noted above, the proposed transportation improvements are located over half a mile northeast of the Willamette River. * * * Willamette Oaks argues that the proposal must provide public access along the river. The basis of this argument is the same as for its argument that the proposal does not comply with EC 9.8815(1) – that the development would be within the Willamette River. The [hearings officer] responded to that point above, concluding that the term ‘the river’ refers to the current channel, not to the former mainstem; the proposed transportation improvements are not occurring within or adjacent to the river. The proposed transportation improvements are more than a half-mile from the river; this provision does not require the applicant to provide access along the river as part of this application.” Record 18-19.

The planning commission adopted those findings. Record 12.

Regarding EC 9.8815(4), the hearings officer found that provisions of the WAP that require public pedestrian access and bicycle access along the river do not apply because the proposed improvements are located more than one-half mile from the Willamette River. Record 22. The planning commission adopted those findings. Record 6-7.

1 Greenway policies as set forth in the Metro Plan.” One of the “applicable Willamette
2 Greenway policies” from the Metro Plan is Policy D-11, which provides that “[t]he taking of
3 an exception shall be required if a non-water-dependent transportation facility requires
4 placing fill within the Willamette River Greenway setback.” The city relied on its
5 construction of the phrase “Willamette River” to conclude that Metro Plan Policy D-11 is
6 met:

7 “The Willamette River Greenway setback is a line separately established
8 within the Willamette Greenway Boundary (* * *) to keep structures separated
9 from the river. * * * As noted elsewhere in this report, the proposed
10 transportation improvements are occurring more than one-half mile (0.6 mile)
11 from the Willamette River. As such, no fill is proposed within the 35-foot
12 Willamette Greenway setback line. * * *” Record 20-21.

13 The planning commission adopted those findings. Record 7.

14 Goodpasture responds to Willamette Oaks’ second assignment of error by arguing
15 that the city properly determined that the proposed improvements would not be located
16 within the setback. However, that determination hinges on the city’s understanding that the
17 proposed improvements are located more than one-half mile away from the Willamette River
18 and consequently are not located within the 35’ setback from the top of the riverbank that is
19 established by the WAP. As explained above, that understanding may be erroneous.

20 We also understand Goodpasture to argue that the city adopted alternative findings
21 that EC 9.8815(3) is not applicable because the proposed transportation improvements are
22 not an “intensification, change of use or development” under EC 9.8815(3). Goodpasture
23 Response Brief 16-17. However, the city’s decision concludes that EC 9.8815(3) applies to
24 the proposal, and that the applicable Metro Plan policies are Policy D-5 and D-11. Record 6-
25 7. The city did not determine, as Goodpasture argues, that the proposed transportation
26 improvements are not an “intensification, change of use or development” under EC
27 9.8815(3).

1 **3. EC 9.8815(3) - Metro Plan Policy D-5**

2 Metro Plan Policy D-5 provides that “[n]ew development that locates along river
3 corridors and waterways shall be limited to uses that are compatible with the natural, scenic,
4 and environmental qualities of those water features.” In his findings regarding Metro Plan
5 Policy D-5, the hearings officer concluded that “as noted elsewhere, the proposed
6 transportation improvements are completely within existing right-of-way and located over a
7 half mile from the Willamette River. * * *” Record 19. However, the hearings officer also
8 concluded in the alternative that Policy D-5 was satisfied:

9 “[t]o the extent this policy applies to the new bridge and transportation
10 improvements at the interchange, [Goodpasture] has provided additional
11 findings that show how the use is compatible with the natural, scenic, and
12 environmental qualities of the nearby ponds. These findings are * * *
13 incorporated herein by reference.” Record 20.

14 The planning commission found that “the [hearings officer’s decision] provides adequate
15 findings that the development is compatible with the various qualities of the water features,
16 * * * and affirms, adopts and incorporates the Hearings Official’s findings and conclusions
17 on this issue set forth on [Record 19-20] of the [hearings officer’s] decision.” Record 12.

18 Although Willamette Oaks argues in its second assignment of error that the hearings
19 officer erred in concluding that the proposed improvements are located “over a half mile
20 from the Willamette River,” Goodpasture responds that the hearings officer and the planning
21 commission adopted alternative findings that Policy D-5 was met. We agree with
22 Goodpasture that the city adopted alternative findings that Policy D-5 was met. Willamette
23 Oaks does not acknowledge or challenge those findings. Absent any challenge to those
24 findings, the portion of Willamette Oaks’ second assignment of error challenging the city’s
25 decision regarding Policy D-5 is denied.

26 The first and sixth assignments of error are sustained, and the second assignment of
27 error is sustained, in part.

1 **THIRD ASSIGNMENT OF ERROR (LUBA No. 2011-049)**

2 EC 9.4900 *et seq.* regulate development within the city's /WR - Water Resources
3 Conservation Overlay Zone. EC 9.4920(2) provides that for protected wetlands, uses and
4 development are restricted within the "Goal 5 Water Resource Site" and "[t]he area within
5 the applicable conservation setback." Filling, grading, and excavating, and removal of native
6 vegetation are prohibited within the conservation setback. EC 9.4930(4). The applicable
7 conservation setback of 50 feet, 25 feet or 0 feet is based on whether the wetland is a
8 Category A, B, or C wetland, respectively. The Goodpasture Wetlands located to the west of
9 the proposed improvements and the Delta Ponds Wetlands to the southeast of the proposed
10 improvements are Category A wetlands and require a 50-foot setback. The Delta Ponds
11 Wetlands to the northeast of the proposed improvements are Category B wetlands and require
12 a 25-foot setback.

13 **A. Wetland Boundary Delineation**

14 EC 9.4920(2)(b) provides:

15 "[c]onservation setback distances for wetlands are measured horizontally from
16 wetland boundaries established under the 'Goal 5 Locally Significant Wetland
17 Sites Within the Eugene Urban Growth Boundary' map or if provided by the
18 property owner, from the jurisdictional wetland boundary accepted by the
19 Oregon Department of State Lands."

20 As part of a concurrent application for standards review that was later withdrawn,
21 Goodpasture initially provided a wetland delineation to the city. However, the hearings
22 officer and the planning commission concluded that where Goodpasture also provided maps
23 that measured the setback distances from wetland boundaries established on the city's
24 adopted Goal 5 maps and requested that the city base its determination on those maps, the
25 city could not rely on the previously introduced wetland delineation:

26 "[The hearings officer] found that while the applicant initially provided a
27 wetland delineation, it never provided the City a jurisdictional wetland
28 boundary formally accepted by the Oregon Department of State Lands
29 (ODSL). [Goodpasture] instead relied on the setback distance as measured

1 horizontally from wetland boundaries established on the City's adopted Goal 5
2 maps, * * * as specifically allowed by EC 9.4920(2)(b).

3 " * * * * *

4 "[The hearings officer] correctly found that there is no restriction in the
5 Eugene Code requiring an applicant to use a wetland delineation that it
6 prepares. Again, EC 4.920(2)(b) states that the distances are measured from
7 wetland boundaries as determined by the City's 'Goal 5 Locally Significant
8 Wetland Sites Within the Eugene Urban Growth Boundary' map, or if
9 provided by the property owner a jurisdictional wetland boundary accepted by
10 ODSL. The applicant in this case chose the Goal 5 map option to determine
11 the wetland boundary and the [hearings officer] correctly found this to comply
12 with applicable standards." Record 10-11.

13 In the third assignment of error, Willamette Oaks challenges the city's reliance on the
14 city's Goal 5 maps to establish the jurisdictional boundaries of the wetlands from which the
15 setbacks are measured. First, Willamette Oaks argues that the planning commission erred in
16 failing to rely on the wetland delineation prepared by Goodpasture's consultants that is in the
17 record. According to Willamette Oaks, the planning commission's interpretation of EC
18 9.4920(2)(b) as not requiring the city to rely upon a wetland delineation provided by the
19 applicant that is part of the record is inconsistent with the purpose of the /WR zone to protect
20 Goal 5 Water Resource sites.

21 Goodpasture responds, and we agree, that EC 9.4920(2)(b) does not require that the
22 city rely upon the wetland delineation provided by Goodpasture. EC 9.4920(2)(b) is framed
23 in the disjunctive, and the setback can be measured from either the city's Goal 5 maps or a
24 wetland delineation, if provided by the property owner. Initially, Goodpasture is not the
25 owner of the property that is the subject of the application. Therefore any wetland boundary
26 delineation provided by Goodpasture is not a boundary delineation "provided by the property
27 owner." Even if Goodpasture is understood to act for the property owner, the text of EC
28 9.4920(2)(b) does not elevate either the Goal 5 map or the property owner's delineation, or
29 require the city to rely upon one or the other. A setback determined from the city's Goal 5
30 map is clearly sufficient to protect identified Goal 5 Water Resources.

1 **B. Goal 5 Map**

2 Willamette Oaks next argues that the city erred in relying on Goodpasture's maps that
3 depict the wetland boundary based on the city's Goal 5 map because the maps were prepared
4 based on GIS information from the city's GIS database, and were not based directly on the
5 city's Goal 5 map. Goodpasture responds that a staff report explains that a GIS map of the
6 wetland boundaries at 1" = 500' Scale is an accurate depiction of the city's Goal 5 map
7 wetland boundaries as long as the GIS map is not a smaller scale than the city's Goal 5
8 Setbacks Map, which is included in the record. Record 938, 943. Willamette Oaks offers no
9 reason to believe that maps based on the city's GIS database, which are derived from the
10 city's Goal 5 map, are inaccurate or differ in any material respect from the city's Goal 5 map.
11 Absent such an argument, we agree with Goodpasture that the map at Record 943 provides
12 substantial evidence regarding the location of the wetland boundaries, and that the city did
13 not err in relying on it to determine the wetland boundary and the setback distances, at least
14 where the map is not a smaller scale than the city's adopted Goal 5 map.

15 **C. WAP Standard 7**

16 Finally, Willamette Oaks also challenges the planning commission's finding that
17 WAP Standard 7, which requires the city to protect significant fish and wildlife habitat, is
18 met through compliance with the provisions of the /WR zone. Petition for Review 21. The
19 hearings officer recognized that the Delta Ponds and the Goodpasture Ponds have been
20 determined to be significant habitat by the Oregon Department of Fish and Wildlife, and
21 found that the /WR conservation overlay codifies the requirement in WAP Standard 7 to
22 protect significant fish and wildlife habitat. Record 23. The planning commission adopted
23 those findings. Record 13. Willamette Oaks does not develop its argument or otherwise
24 explain why the city's decision that compliance with the /WR provisions will protect
25 significant habitat is incorrect.

26 The third assignment of error is denied.

1 **FOURTH ASSIGNMENT OF ERROR (LUBA No. 2011-049)**

2 In its fourth assignment of error Willamette Oaks challenges the city and county
3 authorizations that we conclude above are not land use decisions. In its fourth assignment of
4 error, Willamette Oaks argues that the city erred in approving the Greenway permit
5 application where the applicant was not a public agency and the application was not signed
6 by the city and county, the owners of the property. According to Willamette Oaks, EC
7 9.7010 requires the application to be “signed by the property owner” and the city erred in
8 relying on the city and county authorizations discussed above to demonstrate that the
9 signature requirement was met.

10 We previously determined that the authorizations are not land use decisions and
11 transferred Willamette Oaks’ appeals of the authorizations themselves to the circuit court.
12 However, the issue Willamette Oaks presents above—whether the city erred by approving a
13 Greenway permit application that allegedly does not comply with EC 9.7010—is not an issue
14 the circuit court will be required to address, because the city’s Greenway permit decision is
15 the decision that is before us in this appeal. The city and Goodpasture respond, and we agree,
16 that the planning commission and the hearings officer correctly concluded that the
17 authorizations are the equivalent of signatures on the application and that EC 9.7010 is
18 satisfied.¹¹ The purpose of the signature requirement appears to be to ensure that the owner
19 of the property knows about and consents to the application for development on the property.
20 The authorizations demonstrate that the city engineer and the acting county administrator, as
21 the agents of the local governments, have agreed to allow the application. *Womble v. Wasco*
22 *County*, 54 Or LUBA 68, 79-80 (2007).

¹¹ EC 9.7010 provides:

“Applications shall be submitted on a form approved by the city manager, be accompanied by
a fee established pursuant to EC Chapter 2 *and be signed by the property owner, unless the
applicant is a public agency, in which case the signature of the property owner is not
required. * * **”

1 Willamette Oaks next argues that the city engineer and the acting county
2 administrator and the county public works director had no authority to execute the
3 authorizations. We understand Willamette Oaks to argue that no reasonable decision maker
4 would rely on the authorizations as evidence that EC 9.7010 is met because as a matter of law
5 the persons issuing the authorizations did not have authority to issue them. Whether the city
6 engineer and the acting county administrator and the county public works director actually
7 have authority to execute the authorizations is presumably one of the issues or possibly the
8 only issue that Willamette Oaks will present to the circuit court in the transferred appeals.
9 We express no view here concerning the answer to that question. However, the related
10 question Willamette Oaks asks under this assignment of error - whether a reasonable decision
11 maker would rely on the authorizations as evidence that EC 9.7010 is met - is an evidentiary
12 issue that is properly presented in this appeal and is not likely to be an issue that the circuit
13 court would entertain. We turn to that question.

14 Each of the authorizations includes a statement at the beginning that the person or
15 persons executing it has the authority to do so. We agree with the city and Goodpasture that
16 a reasonable decision maker could conclude that the city engineer and the county
17 administrator and public works director had the authority to provide the authorizations and
18 did not err in relying on the authorizations to find that EC 9.7010 is met, where there is no
19 evidence in the record indicating that the persons who issued the authorizations did not have
20 that authority.¹²

21 The fourth assignment of error is denied.

¹² The hearings officer concluded:

“The hearings official does not believe the level of information that Willamette Oaks asserts is necessary in the record. * * * EC 9.7010 simply does not require this level of information. It requires a signature. The applicant received the needed signatures from the city and county officials who assert they have authority to provide the signatures. The application complies with EC 9.7010.” Record 31-32.

1 **FIFTH ASSIGNMENT OF ERROR (LUBA No. 2011-049)**

2 The subject property is designated in the Metro Plan, and in the WAP Land Use
3 Diagram and Public Facilities Plan as Parks and Open Space. The subject property is not
4 assigned a zoning designation on the city's zoning map, and right of way in the city that is not
5 designated on the zoning map is "deemed to be unzoned." EC 9.1070(3). Willamette Oaks
6 argues that a decision to approve the improvements on land designated Parks and Open Space
7 on the Metro Plan map and the WAP Land Use Diagram and Public Facilities Plan is not
8 consistent with the WAP Goal that the city "[p]rovide for the protection and enhancement of
9 land designated park and open space in the Metro Plan and the Park and Recreation Plan * *
10 *." WAP p. 6. Willamette Oaks also argues that the proposed improvements are inconsistent
11 with Metro Plan Policy H-1, which provides:

12 "Develop a system of regional-metropolitan recreational activity areas based
13 on a facilities plan for the metropolitan area that includes acquisition,
14 development, and management programs. The *Metro Plan* and system should
15 include reservoir and hill parks, the Willamette River Greenway, and other
16 river corridors." Metro Plan III-H-4.

17 As a result, Willamette Oaks argues, the decision is inconsistent with ORS 197.175(2)(d).¹³

18 In response to the argument below, the hearings officer found that the Metro Plan
19 open space policies and the WAP goals do not apply to the proposal:

20 "The Metro Plan * * * notes that [the] diagram is a 'generalized map and
21 graphic;' however, the plan text states that it is drawn at a 'metropolitan scale,
22 necessitating supplementary planning on a local level;' and the land use

¹³ ORS 197.175(2)(d) provides in relevant part that:

"Pursuant to ORS chapters 195, 196 and 197, each city and county in this state shall:

" * * * * *

"(d) If its comprehensive plan and land use regulations have been acknowledged by the
commission, make land use decisions and limited land use decisions in compliance
with the acknowledged plan and land use regulations[.]"

1 designations shown in the diagram 'provide direction for decisions pertaining
2 to appropriate reuse (redevelopment), urbanization of vacant parcels and
3 additional use of underdeveloped parcels.' Metro Plan II-G-1, II-G-2. *These*
4 *statements indicate that it is necessary to look at the refinement plan and*
5 *zoning map to determine if the Delta Highway right-of-way is subject to Metro*
6 *Plan open space policies. If the refinement plan and zoning map apply to the*
7 *Delta Highway right-of-way, then it would be appropriate to apply Metro*
8 *Plan policies.*

9 "The [WAP] land use diagram * * * shows the area of the proposed
10 development in dark green, corresponding to a Parks/Open Space designation.
11 However, Land Use Finding No. 4 (WAP p. 10) states that the WAP study
12 area excludes streets and alleys. The plan text thus indicates that the Delta
13 Highway right of way is not subject to the plan policies.

14 "City staff stated that the land is not zoned open space, rather it is not zoned.

15 " * * * * *

16 "Willamette Oaks' argument that transportation improvements are prohibited
17 within the existing Delta Highway right-of-way has no basis in state law, the
18 Metro Plan or Eugene Code." Record 32-33 (underline in original; italics
19 added).

20 The planning commission adopted those findings. Record 9.

21 According to Willamette Oaks, WAP Finding No. 4 that the hearings officer relies on
22 to conclude that the proposed transportation improvements are not subject to any WAP goals
23 or Metro Plan policies does not support the hearings officer's conclusion because the finding
24 is merely describing the total net area included in the Willakenzie area as "exclud[ing] streets
25 and alleys."¹⁴ Goodpasture responds by pointing out that the subject property is not zoned,

¹⁴ Finding number 4 at WAP p. 10 that the hearings officer relies on is replicated at Petition for Review App. 46 and provides:

"The following findings apply to the Willakenzie planning area as a whole or to generalized land use categories within the Willakenzie area.

"* * * * *

"4. Within the study area there are 5,708 net acres (excludes streets and alleys). Approximately 83 percent of this total (4,732 acres) is within the corporate limits of the city of Eugene. The remainder, 17 percent (976 acres), is unincorporated."

1 that the Metro Plan map designation and the WAP land use designations are implemented by
2 city zoning, and that Willamette Oaks has not explained how the proposal is inconsistent with
3 city zoning.¹⁵

4 We understand the city to have determined that the Metro Plan and the WAP have no
5 goals or policies that apply to the proposed development of the subject property that is right-
6 of-way that is deemed by EC 9.1070(3) to be unzoned, but that is designated Parks and Open
7 Space by the city's Metro Plan. Record 32-33. We agree with Willamette Oaks that the
8 description in finding number 4 of the total acreage of the study area as "exclud[ing] streets
9 and alleys" is not dispositive of the question of whether the city intended that the subject
10 property that is not zoned be excluded from the WAP's open space policies. In general,
11 where property is unzoned, the city must make decisions regarding the property in
12 compliance with the comprehensive plan. *84 Lumber Company v. City of Phoenix*, 4 Or
13 LUBA 14, 17, n 5 (1981); ORS 197.175(2)(d). We do not understand why the city
14 determined that the proposal does not need to be consistent with the Metro Plan open space
15 policies or the WAP's open space policies, or what the city thought was the significance, if
16 any, of the fact that the property is unzoned. The fact that the right-of-way is unzoned does
17 not necessarily mean that Metro Plan and WAP policies applicable to the proposed
18 development of land designated Open Space and Parks do not apply. There may be other
19 reasons why the Metro Plan and WAP goals and policies cited by Willamette Oaks either do
20 not apply to the proposed development or do not apply in the way Willamette Oaks suggests,

¹⁵ Goodpasture also argues that to the extent Willamette Oaks argues that the proposed improvements are inconsistent with Metro Plan *findings* from sections of the Metro Plan that are not the Willamette Greenway policies and with WAP *goals*, Willamette Oaks has not provided a basis for reversal or remand of the decision, because EC 9.8815(3) requires the proposal to conform to "applicable *Willamette Greenway policies* as set forth in the Metro Plan," and EC 9.8815(4) requires the proposal to conform to "[WAP] *use management considerations*." However, we do not understand Willamette Oaks' argument to be an argument under EC 9.8815(3) and (4). Rather, we understand Willamette Oaks to argue that ORS 197.175(2)(d) requires the city's decision on the Greenway permit to be consistent with its acknowledged comprehensive plan and that it is not consistent with one of the WAP goals and with Metro Plan Policy H-1.

1 but neither the decision nor the response briefs cite any such reasons. Accordingly, remand is
2 necessary for the city to consider whether any Metro Plan and WAP goals and policies apply
3 to the proposed development, and if so whether the development is consistent with such goals
4 and policies.

5 The fifth assignment of error is sustained.

6 The city's decision is remanded.

Certificate of Mailing

I hereby certify that I served the foregoing Final Opinion and Order for LUBA No. 2011-019/020/049 on December 6, 2011, by mailing to said parties or their attorney a true copy thereof contained in a sealed envelope with postage prepaid addressed to said parties or their attorney as follows:

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Dated this 6th day of December, 2011.

Kelly Burgess
Paralegal


Kristi Seyfried
Executive Support Specialist

**FINAL ORDER, FINDINGS, AND CONCLUSIONS
OF THE EUGENE PLANNING COMMISSION:
GOODPASTURE ISLAND OFF-SITE TRANSPORTATION
IMPROVEMENTS (WG 10-3)**



I. INTRODUCTION

The Eugene Hearings Official held a public hearing for the subject application on December 15, 2010. The Hearings Official issued a decision approving the Willamette Greenway Permit request on February 24, 2011. On March 9, 2011, an appeal of the Hearings Official's decision was filed by Zack P. Mittge of Hutchinson, Cox, Coons, DuPriest, Orr & Sherlock, P.C. on behalf of Willamette Oaks LLC. The appeal is comprised of 12 assignments of error for the Willamette Greenway Permit as reflected in the written statement submitted by the appellant. The appeal asserts that the Hearings Official erred in his findings and decisions with respect to applicable approval criteria in EC 9.8815.

In accordance with EC 9.7655(1), the City mailed written notice of the appeal hearing to the applicant, the appellant, the Cal Young Neighborhood Association, all persons who submitted written comments in regard to the original application, and all persons who requested notice. The written notice included the required elements set forth in EC 9.7655(2).

The Planning Commission held a public hearing on this appeal on April 5, 2011. At the public hearing, Michael Robinson and Don Sowieja provided oral testimony on behalf of the applicant. Zack Mittge provided oral testimony on behalf of the appellant, Willamette Oaks LLC. Don Sowieja, followed by the applicant's counsel Michael C. Robinson spoke during the rebuttal period on behalf of the applicant. Written testimony was also provided by the parties at the hearing, which is included in the record. The Planning Commission closed the public hearing on April 5, 2011 but allowed for final written argument from the applicant until April 12, 2011.

After the public record was closed, the Planning Commission deliberated the appeal issues at its meeting on April 25, 2011, before taking final action on the appeal. The appeal is based on the record and limited to the assignments of error contained in the appeal statement submitted. As described below, the Planning Commission affirms the Hearings Official's decisions to approve the subject applications with additional findings. Those additional findings are detailed below with respect to each related assignment of error.

II. APPLICABLE CRITERIA

The Willamette Greenway Permit application is required to meet the following approval criteria:

9.8815 Willamette Greenway Permit Approval Criteria and Standards. Willamette Greenway permit approval may be granted only if the proposal conforms to all the criteria in subsections (1) through (4), and the applicable standards of subsection (5) as follows:

- (1)** To the greatest possible degree, the intensification, change of use, or development will provide the maximum possible landscaped area, open space, or vegetation between the activity and the river.

- (2) To the greatest possible degree, necessary and adequate public access will be provided along the Willamette River by appropriate legal means.
- (3) The intensification, change of use, or development will conform with applicable Willamette Greenway policies as set forth in the Metro Plan.
- (4) In areas subject to the Willakenzie Area Plan, the intensification, change of use, or development will conform with that plan's use management considerations.
- (5) In areas not covered by subsection (4) of this section, the intensification, change of use, or development shall conform with the following applicable standards:
 - (a) Establishment of adequate setback lines to keep structures separated from the Willamette River to protect, maintain, preserve, and enhance the natural, scenic, historic, and recreational qualities of the Willamette Greenway. Setback lines need not apply to water related or water dependent activities as defined in the Oregon Statewide Planning Goals and Guidelines (OAR 660-15-000 et seq.).
 - (b) Protection of significant fish and wildlife habitats as identified in the Metropolitan Plan Natural Assets and Constraints Working Paper. Sites subsequently determined to be significant by the Oregon Department of Fish and Wildlife shall also be protected.
 - (c) Protection and enhancement of the natural vegetative fringe along the Willamette River to the maximum extent practicable.
 - (d) Preservation of scenic qualities and viewpoints as identified in the Metropolitan Plan Natural Assets and Constraints Working Paper.
 - (e) Maintenance of public safety and protection of public and private property, especially from vandalism and trespass in both rural and urban areas to the maximum extent practicable.
 - (f) Compatibility of aggregate extraction with the purposes of the Willamette River Greenway and when economically feasible, applicable sections of state law pertaining to Reclamation of Mining Lands (ORS Chapter 517) and Removal of Material; Filling (ORS Chapter 541) designed to minimize adverse effects to water quality, fish and wildlife, vegetation, bank stabilization, stream flow, visual quality, noise, safety, and to guarantee necessary reclamation.
 - (g) Compatibility with recreational lands currently devoted to metropolitan recreational needs, used for parks or open space and owned and controlled by a general purpose government and regulation of such lands so that their use will not interfere with adjacent uses.

As used in this section, the words "the greatest possible degree" are drawn from Oregon Statewide Planning Goal 15 (F.3.b.) and are intended to require a balancing of factors so that each of the identified Willamette Greenway criteria is met to the greatest extent possible without precluding the requested use.

- (6) When site review approval is required, the proposed development will be consistent with the applicable site review criteria.
- (7) The proposal complies with all applicable standards explicitly addressed in the application. An approved adjustment to a standard pursuant to provisions beginning at EC 9.8015 of this land use code constitutes compliance with the standard.

III. RECORD BEFORE THE PLANNING COMMISSION

The record before the Planning Commission consists of the Eugene Planning Commission Agenda Item Summary for Appeal of Hearings Official Decision: Goodpasture Island Off-Site Transportation Improvements (WG 10-3) dated April 5, 2011; the decision of the Eugene Hearings Official, Goodpasture Island Off-Site Transportation Improvements dated February 24, 2011; the written and oral testimony presented by appellant, applicant, and other parties to the Planning Commission; and all written and oral testimony (including City staff reports) presented to and not rejected by the Hearings Official. The entire City Planning & Development Department file was physically before the Planning Commission prior to the close of the record.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

After consideration of the applicable law and all argument and evidence in the record, the Planning Commission finds that the subject applications satisfy all applicable approval criteria. Accordingly, the Planning Commission hereby incorporates the Decision of the Hearings Official, Goodpasture Island PUD: Off-Site Improvements (WG 10-3) (hereinafter referred to as the Willamette Greenway Decision) and affirms the Willamette Greenway Decision, including the findings and conditions stated in the decision. In the event of a conflict the Planning Commission's Final Order controls over the Hearings Official decision.

A. ADDITIONAL FINDINGS AND MODIFIED CONDITIONS OF APPROVAL

On March 9, 2011 a written appeal statement was submitted by Zack P. Mittge of Hutchinson, Cox, Coons, DuPriest, Orr & Sherlock, P.C. on behalf of Willamette Oaks LLC, included a total of twelve (12) assignments of error. Each of these assignments of error is set forth below, followed by the Planning Commission's findings of fact and conclusions of law as to each one.

Appellant's First Assignment of Error:

The Hearings Official misinterpreted applicable law and made a decision that is not supported by adequate findings, substantial evidence or substantial reasons, in holding that Willamette River Greenway permit criteria (including applicable Metro Plan and Willakenzie Area Plan Use Management Standards) are not applicable to the proposed project even though it is located entirely within the river channel of the Willamette River Greenway. (Including EC 9.8815(1),(2),(3) and (4) and Metro Plan policies D.5 and D.11)

The Hearings Official completed a detailed analysis of the cited Metro Plan policies and Willamette Greenway approval criteria. The Hearings Official acknowledges the project area is entirely within the Willamette River Greenway, while noting that the proposed improvements would be located approximately 3,200 feet from the existing channel of the Willamette River. The Hearings Official does not find that the Greenway criteria in this appeal issue are not applicable to the project as asserted in this assignment of error, rather the Hearings Official correctly addresses the Greenway criteria in the context of the project being over a half mile from "the river".

The Hearings Official completed a detailed analysis and addresses the issue of the river channel location in relationship to the project on page 3, 4 and 7 of the Willamette Greenway Decision based on the record. The Hearings Official correctly interprets that the term "the river" refers only to the current channel of the Willamette River not to a (possible) former channel of the river as the

appellant asserts. While the appellant refers to “former river channels” and various reaches of the Willamette River throughout the testimony, the appellant has not provided evidence establishing that the project location is in the area of a former river channel.

The Planning Commission finds that the Willamette Greenway Decision provides adequate findings on this issue, and there is no substantial evidence in the record of any error by the Hearings Official. For the reasons set forth in the Willamette Greenway decision, the April 5 Staff Agenda Item Summary, the Applicant’s April 5 Letter and the Applicant’s April 12 letter, the Planning Commission denies the appellant’s first assignment of error and affirms, adopts and incorporates the Hearings Official’s findings and conclusions on this issue set forth on pages 3-10 of the Willamette Greenway Decision.

Appellant’s Second Assignment of Error:

The Hearings Official misinterpreted applicable law and made a decision that is not supported by adequate findings, substantial evidence or substantial reasons by permitting the placement of fill within the Greenway setback without a Goal exception required by Policy D.11 of the Metro Plan.

Policy D.11 requires an exception to Statewide Planning Goal 15 for placing of fill within the Willamette Greenway setback. The Hearings Official completed a detailed analysis of this issue at pages 6 and 7 of the Willamette Greenway Decision and found that the Willamette Greenway setback line, is a line separately established within the Willamette Greenway Boundary to keep structures separated from the river. While the development is clearly within the boundaries of the Willamette River Greenway, the Willakenzie Area Plan (WAP) establishes a “setback line” at “35 feet from the top of the riverbank”. As the transportation improvements are located more than one-half mile from the river, no fill is proposed within this setback which would require a Goal exception. The Hearings Official also provided findings responding to Willamette Oaks arguments that the improvements are in the river by noting that the term “river” only refers to the current channel of the Willamette River, not a possible former channel of the river as the appellant asserts.

The Planning Commission finds that the Willamette Greenway Decision provides adequate findings on this issue, and there is no substantial evidence in the record of any error by the Hearings Official. For the reasons set forth in the Willamette Greenway Decision, the April 5 Staff Agenda Item Summary, the Applicant’s April 5 Letter and the Applicant’s April 12 letter, the Planning Commission denies the appellant’s second assignment of error and affirms, adopts and incorporates the Hearings Official’s findings and conclusions on this issue set forth on pages 6-7 of the Willamette Greenway Decision.

Appellant’s Third Assignment of Error:

The Hearings Official misinterpreted applicable law and made a decision that is not supported by adequate findings, substantial evidence or substantial reasons by approving an application for a Willamette River Greenway permit for property that is not owned by the applicant.

The area of the request is public right of way owned by Lane County with the City of Eugene having jurisdiction over the Goodpasture Island Road bridge structure. The Hearings Official found that while EC 9.7010 requires that applications be signed by the property owners there is no requirement in the Eugene Code or State statute that the property be owned by the applicant as

asserted in this assignment of error. The Hearings Official correctly concluded the applicant received the needed signatures from the City and County representatives.

The Planning Commission finds that the Willamette Greenway Decision provides adequate findings on this issue, and there is no substantial evidence in the record of any error by the Hearings Official. For the reasons set forth in the Willamette Greenway Decision, the April 5 Staff Agenda Item Summary, the Applicant's April 5 Letter, the Applicant's April 12 letter, the Planning Commission denies the appellant's third assignment of error and affirms adopts and incorporates the Hearings Official's findings and conclusions on this issue set forth on pages 17-18 of the Willamette Greenway Decision.

Appellant's Fourth Assignment of Error:

The Hearings Official misinterpreted applicable law and made a decision that is not supported by adequate findings, substantial evidence or substantial reasons by relying on purported "authorizations" from employees of the City of Eugene and Lane County to authorize the applicant to file a Willamette River Greenway permit on public property.

The Hearings Official addresses this issue on pages 17 and 18 of the Willamette Greenway Decision. The area of the request is public right of way owned by Lane County with the City of Eugene having jurisdiction over the Goodpasture Island Road bridge structure. The appellant asserts that the authorizations provided by the applicant that were signed by representatives of the City of Eugene and Lane County to make the Willamette Greenway application are not sufficient. The applicant submitted a letter from Mark Schoening, City Engineer on behalf of the City of Eugene, and a letter from Liane Richardson, Acting County Administrator as well as Marsha Miller, Director of Lane County Public Works to authorize the application pursuant to EC 9.7010. The Hearings Official found that the persons who signed the authorizations could make such authorizations.

The Planning Commission finds that the Willamette Greenway Decision provides adequate findings on this issue, and there is no substantial evidence in the record of any error by the Hearings Official. For the reasons set forth in the Willamette Greenway Decision, the April 5 Staff Agenda Item Summary, the Applicant's April 5 Letter and the Applicant's April 12 letter, the Planning Commission denies the appellant's fourth assignment of error and affirms adopts and incorporates the Hearings Official's findings and conclusions on this issue set forth on pages 17-18 of the Willamette Greenway Decision.

Appellant's Fifth Assignment of Error:

The Hearings Official misinterpreted applicable law and made a decision that is not supported by adequate findings, substantial evidence or substantial reasons by approving a Willamette River Greenway permit for a transportation facility that is not contained in and is inconsistent with the TransPlan.

The appellant's statement is vague and fails to identify an applicable criterion to which these arguments apply, as required by EC 9.7655(3). Nonetheless, the Planning Commission further addresses this issue as a precautionary measure in the event of additional appeals.

The Hearings Official noted that the approved tentative PUD (PDT 09-1) and zone change (Z 09-6) (approved by Hearings Official and Planning Commission) concluded that the proposed bridge and additional lanes are consistent with Transplan. The proposed bridge and additional lanes are not

changing functionally so there is nothing that would change (or provide a factual legal basis for changing) this prior conclusion.

The Planning Commission finds that the Willamette Greenway Decision provides adequate findings on this issue, as it has been previously confirmed as part of the tentative PUD approval (PDT 09-1), that the proposal is consistent with TransPlan and there is no substantial evidence in the record of any error by the Hearings Official. The Planning Commission also finds that this appeal issue does not relate to any applicable approval criteria for the Willamette Greenway Permit approval as granted. For the reasons set forth in the Willamette Greenway Decision, the April 5 Staff Agenda Item Summary, the Applicant's April 5 Letter and the Applicant's April 12 letter, the Planning Commission denies the appellant's fifth assignment of error and affirms, adopts and incorporates the Hearings Official's findings and conclusions on this issue set forth on pages 18 of the Willamette Greenway Decision.

Appellant's Sixth Assignment of Error:

The Hearings Official misinterpreted applicable law and made a decision that is not supported by adequate findings, substantial evidence or substantial reasons by approving a Willamette River Greenway permit for development within an area designated as Parks and Open Space in both the Metro Plan and the Willakenzie Area Plan and which is required to be zoned as open space by Goal 15.

Again, the appellant's statement is vague and fails to identify an applicable criterion to which these arguments apply, as required by EC 9.7655(3). Nonetheless, the Planning Commission further addresses this issue as a precautionary measure in the event of additional appeals.

The Hearings Official notes that the adopted Metro Plan diagram and WAP does show the project area in dark green corresponding to the Parks and Open Space designation. However, the Hearings Official also notes that the Metro Plan diagram is a "generalized map and graphic", and the plan text states that it is drawn at a "metropolitan scale, necessitating supplementary planning on a local level". The WAP plan text also indicates that right of way is not subject to the plan policies, and right of way is not zoned under the Eugene Code. As noted earlier, this application involves land entirely within existing right of way.

The Planning Commission finds that the Willamette Greenway Decision provides adequate findings on this issue, and there is no substantial evidence in the record of any error by the Hearings Official. For the reasons set forth in the Willamette Greenway Decision, the April 5 Staff Agenda Item Summary, the Applicant's April 5 Letter and the Applicant's April 12 letter, the Planning Commission denies the appellant's sixth assignment of error and affirms, adopts and incorporates the Hearings Official's findings and conclusions on this issue set forth on pages 18-19 of the Willamette Greenway Decision.

Appellant's Seventh Willamette Greenway Assignment of Error:

The Hearings Official misinterpreted applicable law and made a decision that is not supported by adequate findings, substantial evidence or substantial reasons by approving a Willamette River Greenway permit that would require filling, grading, excavating, and removal of native vegetation prohibited by the City's Water Resources standards at EC 9.4900 et seq.

The Hearings Official addressed three arguments made by the appellant with respect to the /WR Water Resource Standards. First, the appellant argues that the application submittals show construction within conservation area setbacks. In response to this argument, the Hearings Official found that while the applicant initially provided a wetland delineation, it never provided the City a jurisdictional wetland boundary formally accepted by the Oregon Division of State Lands (ODSL). The applicant instead relied on the setback distance as measured horizontally from wetland boundaries established on the City's adopted Goal 5 maps ("Goal 5 Locally Significant Wetland Sites Within the Eugene Urban Growth Boundary"), as specifically allowed by EC 9.4920(2)(b).

Based on the evidence provided, the Hearings Official found that the proposal avoided the conservation setback as measured from the adopted Goal 5 resource site boundary, but pointed out that some of the applicant's maps contained either conflicting or insufficiently detailed notes to make this clear. The Hearing Official therefore correctly imposed a condition of approval requiring the applicant to clarify its final maps.

Second, Willamette Oaks argued that the City's "Goal 5 Locally Significant Wetland Sites Within the Eugene Urban Growth Boundary" map is not detailed enough to provide for a precise delineation of the conservation setback. The Hearings Official noted that the Planning Commission described the process for delineating a Goal 5 / WR Site boundary in the November 2008 decision on appeal of Alder Woods PUD (PDT 07-5 and SDR 08-2). The Hearings Official did not make a distinction between this proposal and the Alder Woods PUD decision in referring to the /WR Water Resources Conservation Overlay Zone, noting that the information provided in this application was detailed enough to determine the improvements would not take place in the setbacks (as measured from the resource site according to code) and concluded that the development would not take place within the /WR resource or applicable setbacks based on information provided by the applicant and staff.

While the Hearings Official did not need to make a distinction in order to find that the standards and criteria were met, the Planning Commission finds that a distinction should be made between the process set forth above by the Planning Commission in the Alder Woods PUD appeal in delineating a *riparian* resource site and the process for delineating a *wetland* resource site setback (as was the case in this application).

Given this distinction, the Planning Commission clarifies its interpretation to state that the two part process set forth in Alder Woods is not applicable to wetland resource sites, as the code at EC 9.4920(2)(b) clearly sets forth that an applicant may choose to use either the adopted Goal 5 resource site boundary in determining the setback or if provided by the property owner a wetland delineation accepted by ODSL. Furthermore, in no case with a wetland resource site, would there be a situation like Alder Woods where the adopted resource site boundary extends beyond the setback.

Third, and last, the appellant argued at the hearing that once the applicant delineates a wetland and receives ODSL concurrence, it cannot step back and choose to use the City's map. The Hearings Official correctly found that there is no restriction in the Eugene Code requiring an applicant to use a wetland delineation that it prepares. Again, EC 9.4920(2)(b) states that the distances are measured from wetland boundaries as determined by the City's "Goal 5 Locally

Significant Wetland Sites Within the Eugene Urban Growth Boundary” map, or if provided by the property owner a jurisdictional wetland boundary accepted by ODSL. The applicant in this case chose the Goal 5 map option to determine the wetland boundary and the Hearings Official correctly found this to comply with applicable standards.

As such, the Planning Commission finds that there is no substantial evidence in the record of any error by the Hearings Official. For the reasons set forth in the Willamette Greenway decision, April 5 Staff Agenda Item Summary, the Applicant’s April 5 Letter and the Applicant’s April 12 letter, the Planning Commission denies the appellant’s seventh assignment of error and affirms, adopts and incorporates the Hearings Official’s findings and conclusions on this issue set forth on pages 10-14 of the Willamette Greenway Decision.

Appellant’s Eighth Assignment of Error:

The Hearings Official misinterpreted applicable law and made a decision that is not supported by adequate findings, substantial evidence or substantial reasons in holding that the proposed intensification, change of use or development would, to the greatest possible degree, provide the maximum landscaped area, open space and vegetation between the activity and the river where the proposal is within the channel of the Debrick Slough/Delta Ponds reach of the Willamette River, and requires the construction of an unplanned transportation facility, with associated filling, retaining walls and native vegetation removal within or immediately adjoining conservation areas.

The Hearings Official acknowledges the project area is entirely within the Willamette River Greenway, but the decision notes that the proposed improvements would be located approximately 3,200 feet from the existing channel of the Willamette River. The Hearings Official correctly interprets that the term “the river” refers only to the current channel of the Willamette River not to a (possible) former channel as the appellant previously asserted. Additionally, the Hearings Official correctly notes that the relevant “measuring area” for this criterion is the land between the activity and the river. In this case, there would be no change to the landscaped area, open space or vegetation between the activity and the river.

The Planning Commission finds that the Willamette Greenway Decision provides adequate findings on this issue, and there is no substantial evidence in the record of any error by the Hearings Official. For the reasons set forth in the Willamette Greenway Decision, the April 5 Staff Agenda Item Summary, the Applicant’s April 5 Letter and the Applicant’s April 12 letter, the Planning Commission denies the appellant’s eighth assignment of error and affirms, adopts and incorporates the Hearings Official’s findings and conclusions on this issue set forth on pages 3-7 of the Willamette Greenway Decision.

Appellant’s Ninth Assignment of Error:

The Hearings Official misinterpreted applicable law and made a decision that is not supported by adequate findings, substantial evidence or substantial reasons in holding that the proposed intensification, change of use or development would, to the greatest possible degree, provide necessary and adequate public access to and along the river where the proposal provides no access to the Debrick Slough/Delta Ponds reach of the river, and fails to provide pedestrian connections as required by EC 9.6835(2), “Design

Standards for Eugene Streets, Sidewalks, Bikeways and Accessways” and applicable ADA standards or sidewalk connection standards in Chapter 7.1

The Hearings Official addresses this issue regarding public access by noting that the criterion does not include or refer to possible former river channels as asserted by the appellant, and that the proposal is more than a half-mile from “the river”. As such, this provision does not require the applicant to provide access along the river as the project area is not located along the river. The proposed bridge includes required sidewalks and the Hearings Official provided a condition on page 14 of the decision that requires that all public improvements be designed and constructed to Chapter 7 standards.

The Planning Commission finds that the Willamette Greenway Decision provides adequate findings on this issue, and there is no substantial evidence in the record of any error by the Hearings Official. For the reasons set forth in the Willamette Greenway Decision, the April 5 Staff Agenda Item Summary, the Applicant’s April 5 Letter and the Applicant’s April 12 letter, the Planning Commission denies the appellant’s ninth assignment of error and affirms, adopts and incorporates the Hearings Official’s findings and conclusions on this issue set forth on pages 3-7 and 14-15 of the Willamette Greenway Decision.

Appellant’s Tenth Assignment of Error:

The Hearings Official misinterpreted applicable law and made a decision that is not supported by adequate findings, substantial evidence or substantial reasons in holding that policy D.5 Metro Plan is not applicable to the application, or that the proposed new development is compatible with natural, scenic and environmental qualities of the water features based on the existing transportation facilities, the /WR overlay designation, or the “additional findings” at Page 1 of Section 2 of the applicant’s written statement.

Metro Plan Policy D.5 notes that new developments located along river corridors should be limited to uses that are compatible with various qualities of those water features. The Hearings Official did not find that this policy is inapplicable as asserted by the appellant. The Hearings Official addresses this policy at length, correctly noting that the policy does not prohibit the continued use of right of way for transportation purposes.

The Planning Commission finds that the Willamette Greenway Decision provides adequate findings that the development is compatible with the various qualities of the water features, and there is no substantial evidence in the record of any error by the Hearings Official. For the reasons set forth in the April 5 Staff Agenda Item Summary, the Applicant’s April 5 Letter and the Applicant’s April 12 letter, the Planning Commission denies the appellant’s tenth assignment of error and affirms, adopts and incorporates the Hearings Official’s findings and conclusions on this issue set forth on pages 5-6 of the Willamette Greenway Decision.

Appellant's Eleventh Assignment of Error:

The Hearings Official misinterpreted applicable law and made a decision that is not supported by adequate findings, substantial evidence or substantial reasons in holding that the proposal conforms to Willakenzie Area Plan standards 2, 4 and 7.

Again, the appellant's statement is vague and fails to identify an applicable criterion to which these arguments apply, as required by EC 9.7655(3). Nonetheless, the Planning Commission further addresses this issue as a precautionary measure in the event of additional appeals.

Standard #2 provides for public pedestrian and bicycle access along the river. The Hearings Official correctly notes that the development is located more than one-half mile from the river and access is already provided to the river by the intervening properties. (see also, Assignment of Error 1, regarding the definition of "the river").

Standard #4 only *discourages* facades and walls exceeding 75 feet in length. The Hearings Official agrees with the appellant that there would be a retaining wall in excess of 75 feet in length; however, the wall would be on the northeast facing only a wetland and would not constrain visual access to and from the river.

Standard #7 requires protection of fish and wildlife habitat. The Hearings Official noted that protection of the adjacent significant habitat is provided by compliance with codified /WR Water Resource standards. (see also, Assignment of Error 7 regarding compliance with /WR overlay requirements).

The Planning Commission finds that the Willamette Greenway Decision provides adequate findings to provide that the development conforms to Willakenzie Area Plan standards 2, 4 and 7, and there is no substantial evidence in the record of any error by the Hearings Official. For the reasons set forth in the Willamette Greenway Decision, the April 5 Staff Agenda Item Summary, the Applicant's April 5 Letter and the Applicant's April 12 letter, the Planning Commission denies the appellant's eleventh assignment of error and affirms adopts and incorporates the Hearings Official's findings and conclusions on this issue set forth on pages 7-10 of the Willamette Greenway Decision.

Appellant's Twelfth Assignment of Error:

The Hearings Official misinterpreted applicable law and made a decision that is not supported by adequate findings, substantial evidence or substantial reasons in holding that the proposal conforms to applicable Geological and Geotechnical requirements under EC 9.6710.

The Hearings Official's decision notes that the applicant submitted a Level 2 geotechnical analysis which provided the required analysis of site characteristics, sub-surface investigation, and recommendations for design and construction, consistent with applicable standards. Public Works staff concurred with this initial geotechnical assessment. Adherence to the report recommendations (or subsequent recommendations resulting from the new information submitted during this permit process) will be required during the subsequent Privately Engineered Public Improvement permit process. The Hearings Official considered testimony provided by GeoSceince,

Inc. on behalf of the appellant and subsequent response from K&A Engineering on behalf of the applicant.

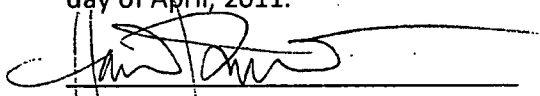
The Hearings Official's decision notes that the appellant presented a professional difference in opinion about how the analysis was conducted, but found that the applicant's engineers adequately explained the basis of the methods and conclusions in response to the issues raised. As such, the Hearing Official correctly concludes that the applicant's geotechnical analysis satisfies EC 9.6710.

The Planning Commission finds that the Willamette Greenway Decision provides adequate findings to provide that the development meets the applicable Geological and Geotechnical requirements under EC 9.6710, and there is no substantial evidence in the record of any error by the Hearings Official. For the reasons set forth in the April 5 Staff Agenda Item Summary, the Applicant's April 5 Letter and the Applicant's April 12 letter, the Planning Commission denies the appellant's twelfth assignment of error and affirms adopts and incorporates the Hearings Official's findings and conclusions on this issue set forth on page 15 of the Willamette Greenway Decision.

V. CONCLUSION

The Eugene Planning Commission has reviewed the record and the appellant's assignments of error, and has voted to affirm the decision of the Hearings Official to approve the Willamette Greenway Permit for Goodpasture Island PUD: Off-site Transportation Improvements (WG 10-3). Additional findings are provided in Section IV of this Final Order.

The foregoing findings and conclusions are adopted as the Final Order of the Eugene Planning Commission for Goodpasture Island PUD: Off-site Transportation Improvements (WG 10-3), this 25th day of April, 2011.


Heidi Beierle, Chair
Eugene Planning Commission

**DECISION OF THE HEARING OFFICIAL
FOR THE CITY OF EUGENE, OREGON**

WILLAMETTE GREENWAY PERMIT

Application File Name (Number):

Goodpasture Island PUD: Off-Site Transportation Improvements (WG 10-3)

Applicant's Request:

Approval of Willamette Greenway Permit application for transportation improvements including a new bridge. Located at the Goodpasture Island Road/Delta Highway intersection.

Subject Property/Zoning/Location:

Goodpasture Island Road and Delta Highway Interchange. The area of request is public right-of-way and is not zoned.

Relevant Dates:

Application submitted on August 24, 2010; supplemental information submitted October 29, 2010; application deemed complete on October 29, 2010; public hearing held on December 15, 2010.

Applicant's Representative:

Don Sowiejka, Myhre Group Architects, Inc. (503) 236-6000

Lead City Staff:

Steve Ochs, Associate Planner, Eugene Planning Division, Phone: (541) 682-5453

The hearing official held a hearing on this application and a hearing on an appeal of another application by the same applicants, No. PDF 10-3, ST 10-5, MDA 10-4, on the same date. This decision is for the Willamette River Greenway Permit request only. The hearing official prepared a separate decision for the other application.

Summary of the Public Hearing

The hearing official held a public hearing on this application on December 15, 2010. The hearing official stated he had no conflicts of interests and no *ex parte* communications. No person objected to the hearing official conducting the hearing.

Steve Ochs, Associate Planner, Gabe Flock, Senior Planner, and Gary McNeel, Senior Transportation Analyst were present and spoke for the city. The city recommended the application complied with the approval criteria for a Willamette Greenway approval.

Donald Sowieja, Myhre Group, Architects, Mike Shippey, Coyote Creek Ecological Services, Brian Genovese, JRH Transportation Engineering, Justin Gerlitz, ZCF Engineering, and Troy Lyver, ZCF Engineering, presented the application for the applicant. Mr. Sowieja stated that the applicant concurred with the staff report and recommended conditions of approval.

Zack Mittge, Hutchison, Cox, Coons, DuPriest, Orr & Sherlock, PC, presented testimony and evidence in opposition to the application for Willamette Oaks, LLC. Gunnar Schlieder, GeoScience, Inc. also presented evidence for Willamette Oaks, LLC.

Donald Sowieja, Justin Gerlitz, Brian Genovese, and Michael Robinson, Perkins Coie, representing the applicant, presented rebuttal testimony.

The applicant and Mr. Mittge requested to hold the record open to allow time for submission of additional evidence. The hearing official established the following deadlines: December 29, 2011 for submission of new evidence, January 5, 2011 for submission of rebuttal, and January 12, 2011 for the applicants' final legal argument. There were no objections to any of the materials submitted during this open-record period; the hearing official accepts all of the materials the parties submitted during this open-record period.

Following the open record period, the applicant moved to reopen to record to submit additional evidence. The hearing official granted the motion and allowed rebuttal. The applicant waived final legal argument for this reopened record period.

Documents Considered by the Hearing Official

The hearing official received and reviewed voluminous application materials with multiple large-format maps and appendices, referral comments, the staff recommendation, comments to the hearing official (including lengthy submissions from Willamette Oaks), and documents submitted at the hearing and during the two open record periods. Typically, the hearing official lists each document in the decision; however the vast number of documents makes such a list impractical here. City staff has preserved the originals of each document in the city files.

Site Characteristics and Present Request

In June of 2010, the applicant received tentative PUD and Zone Change approval to construct a 583-unit multi-family development on a development site located at Goodpasture Island Road and Alexander Loop (see PDT 09-1, TIA 09-4 and Z 09-6). As part of that application, the applicant proposed off-site transportation facility capacity improvements at the Goodpasture Island Road/Delta Highway interchange. The hearing official and Planning Commission imposed conditions of approval requiring the proposed improvements. The applicant is now requesting approval to construct the improvements. The improvements include a new bridge associated with the widening of Goodpasture Island Road and the widening of interchange approaches. The proposed transportation improvements are located completely within the Willamette

Greenway boundary and completely within existing Delta Highway right-of-way. The area of the transportation improvements is adjacent to Goal 5 protected Delta Ponds wetlands to the east and Goodpasture wetlands to the west. The Goodpasture wetlands to the west and Delta Ponds wetlands to the southeast are both Goal 5, Category A wetlands, both of which require a conservation setback of 50 feet from the resource boundary. The Delta Ponds wetlands to the northeast are Category B wetlands, which require a conservation setback of 25 feet. The application materials contain additional details about the proposal.

Evaluation of Willamette River Greenway Permit Criteria

The criteria for development within the Willamette Greenway are found in EC 9.8815. The approval criteria are shown below in **bold** typeface, with findings and conclusions related to each, based on the record before the hearing official.

EC 9.8815(1): To the greatest possible degree, the intensification, change of use, or development will provide the maximum possible landscaped area, open space, or vegetation between the activity and the river.

The staff report notes the new bridge structure (including the additional lanes) would be located on the northeast side of the existing bridge structure. At its closest point the existing channel of the Willamette River is approximately 3,200 feet (0.6 miles) to the southwest of the project site. The area between the project area and the river is extensively developed with a variety of uses including multi-family developments, subdivisions and commercial development. The improvements will be located on the side of the existing bridge away from the river; thus the area between the new bridge and the river will remain unchanged.

Willamette Oaks argues that the transportation improvements would be entirely within the channel of the former mainstem of the Willamette River and in an area designated in the City's acknowledged comprehensive plan. As such, Willamette Oaks argues, the very nature of constructing transportation improvements cannot provide maximum possible landscaped area, open space or vegetation between the activity and the river. Letter from Zack Mittge (Dec. 15, 2010). The hearing official notes that the Eugene Code does not define the Willamette River, so determining whether the term "the river" in this provision requires interpretation.

Context indicates that the term "the river" refers to only the current channel of the Willamette River. Context is found in the Willakenzie Area Plan (WAP), which contains a transportation element. This element describes "river crossings." WAP pp. 80–81. Within this description is a listing of vehicular bridges—the Ferry Street Bridge, the Washington-Jefferson Bridge, and Beltline Bridge, which "cross the Willamette River within the planning area." WAP at 80. As well, the WAP lists four bicycle bridges "crossing the Willamette in the plan area." Each of these bridges crosses only the current channel of the river. This element does not mention the Delta Highway overpasses as a "river crossing." In fact, the base map used within the transportation element contains a "Willamette River" label, which appears only within the current channel, not the former channel where the Delta Highway is located. See, e.g., WAP at

82, 84, and 86. Additionally, city staff stated that the city has previously applied the Willamette Greenway requirements to the current channel of the river, not to former channels. Staff noted that the code does not use the term "former" in the Willamette Greenway requirements. Memo from Steve Ochs (Dec. 29, 2010). Based on all of this context, the hearing official concludes that the term "the river" as used in this criterion refers to the mainstem of the Willamette River, not to former channels.

Additionally, the hearing official notes that this criterion evaluates the landscaped area, open space, and vegetation between the activity and the river. Willamette Oaks' argument that the activity (the bridge and additional lanes) could not be permitted under this provision because it would occur within the river itself is not responsive to the provision. The provision does not ask whether the activity itself would provide maximum landscaped area, open space, or vegetation; rather, the measuring area is the land between the activity and the river, not the activity itself. The staff report accurately states that there would be no change to the landscaped area, open space or vegetation between the activity and the river.

As shown on the applicant's tree protection plan (sheet GP-2), six trees are to be removed on the north side of the existing bridge. There are no trees being removed on the southwest side of the existing bridge between the activity and the river. Four of the trees to be removed are in the median near the bridge while two are located near the Delta Pond fringe, but outside of the Goal 5 conservation setback for the wetland. To mitigate the removal of these six trees, the applicant has provided a planting plan that proposes the planting of 20 replacement trees and replanting of areas that may be disturbed through the construction process (see Sheets L2.0, L2.1 and L2.2).

Based on the available information, EC 9.8815(1) is satisfied.

EC 9.8815(2): To the greatest possible degree, necessary and adequate public access will be provided to and along the river by appropriate legal means.

As noted above, the proposed transportation improvements are located over half a mile northeast of the Willamette River. The proposed transportation facilities changes include:

- 1) Improvement of the southbound off-ramp, by changing the lane use of existing lanes.
- 2) Widening Goodpasture Island Road Bridge by adding a bridge structure on the north side of the existing bridge, so the existing bridge will accommodate eastbound travel and the new bridge westbound travel.
- 3) Widening Goodpasture Island Road east of the existing bridge to accommodate four traffic lanes.
- 4) Widening the northbound Delta Highway on-ramp to two lanes.
- 5) Tapering Goodpasture Island Road to the existing width at both ends of the improvements.
- 6) Installing traffic signal modifications to accommodate the roadway changes.

The bridge improvements will provide additional turn lanes and accommodate automobile travel in a more efficient manner, which provides drivers adequate access traveling to the river. The existing bridge has one 3.5-foot bicycle lane (eastbound) and a 5-foot shared bike/pedestrian path. The proposed improvements will result in 5-foot bicycle lanes traveling each direction. Additionally, a separate 8-foot wide sidewalk will be provided on the new bridge (see Exhibit 2). These additional improvements will provide safer and more convenient public access for pedestrians traveling to and from the river to the south and west.

These improvements are all confined to the Delta Highway right-of-way a long distance from the river and will not impact existing access to the river on the intervening properties. Existing development and public ways connect to the East Bank Trail, which provides public access to the Willamette River.

The applicant's written statement further indicates that the proposed improvements will not hinder planned future paths within the Delta Pond area (see page 2 of Section 01 of the applicant's written statement).

Willamette Oaks argues that the proposal must provide public access along the river. The basis of this argument is the same as for its argument that the proposal does not comply with EC 9.8815(1)—that the development would be within the Willamette River. The hearing official responded to that point above, concluding that the term "the river" refers to the current channel, not to the former mainstem; the proposed transportation improvements are not occurring within or adjacent to the river. The proposed transportation improvements are more than a half-mile from the river; this provision does not require the applicant to provide access along the river as part of this application.

Because the improvements enhance vehicular, bicycle and pedestrian connections to the street, bicycle and sidewalk network that access the river, the proposal provides necessary and adequate public access to the river to the greatest degree possible. EC 9.8815(2) is satisfied.

EC 9.8815(3): The intensification, change of use, or development will conform with applicable Willamette Greenway policies as set forth in the Metro Plan.

Pages III-D-4 and 5 of the Metro Plan contain the Willamette Greenway policies. Of these, several policies apply specifically to local government agency services. The following Metro Plan policies are potentially relevant to the proposal.

Policy D.5: New development that locates along river corridors and waterways shall be limited to uses that are compatible with the natural, scenic, and environmental qualities of those water features.

This development is located near the Delta Ponds and Goodpasture Pond. As noted elsewhere, the proposed transportation improvements are completely within existing right-of-way and located over a half mile from the Willamette River. As part of the tentative PUD decision for

Goodpasture Island PUD (PDT 09-1) the hearing official found in part, "The text of this policy (specifically the words, "shall be limited to uses") indicates that it applies when developing lists of allowable uses in zoning ordinances. This policy could also apply to a site-specific application such as this application where the zoning code allows, on a case-by-case basis, for limiting the range of uses allowed. Additionally, this policy implements a number of Metro Plan findings. For example, finding 12 states that residential and commercial development along the Willamette River Greenway provides greater opportunity for public access and enjoyment than industrial use. Implicit in finding 12 is that residential development is compatible with the natural, scenic, and environmental qualities of water features, consistent with this policy."

Here, the use within the right-of-way for transportation purposes and facilities has long been established. Because the right-of-way is being used for the purposes of transportation and the proposal does not change the use, or limit the range of allowed uses, this policy does not prohibit the continued use of the right-of-way for transportation purposes. Right-of-way is not zoned and specifically intended for transportation facilities such as proposed.

To the extent this policy applies to the new bridge and transportation improvements at the interchange, the applicant has provided additional findings that show how the use is compatible with the natural, scenic, and environmental qualities of the nearby ponds. These findings are found on page 1 of Section 02 of the applicant's written statement and are incorporated herein by reference.

Additionally, compliance with the intent of this policy is further assured through codified protection of Goal 5 resources by the current /WR overlay designation and need to comply with EC 9.4900 et seq. This section states that the purpose of the /WR overlay is to provide conservation of significant riparian areas, wetlands and other water-related wildlife habitat areas included on the city's Goal 5 inventory, and the water quality within these resource areas. Consistent with this policy, the /WR overlay limits uses in the resource areas and setbacks. As noted below at EC 9.8815(7) the proposed transportation improvements are occurring entirely outside of the adjacent /WR conservation areas and setbacks.

Willamette Oaks argues that the road widening and bridge construction are not compatible with the natural, scenic, and environmental qualities of the water features within the river corridor. The basis for this argument appears to be Willamette Oak's argument that the proposed development would encroach into the conservation setback. This decision addresses that argument below in response to EC 9.4900 Water Resource /WR standards, concluding that the proposed transportation improvements are not within the conservation setback.

Policy D.11: The taking of an exception shall be required if a non-water-dependent transportation facility requires placing of fill within the Willamette River Greenway setback.

The Willamette River Greenway setback is a line separately established within the Willamette Greenway Boundary (see Goal 15, OAR 660-0150-0005(C)(3)(K)) to keep structures separated

from the river. While the development site is clearly within the boundary of the Willamette River Greenway, the subject site is also within the City-adopted refinement plan—the Willakenzie Area Plan (WAP). The WAP includes use management standards, which establish a Willamette River Greenway “setback line” at “35-feet back from the top of the riverbank” (Land Use Management Standard #1, page 155). These land use standards were specifically established in the WAP to implement Goal 15.

As noted elsewhere in this report, the proposed transportation improvements are occurring more than one-half mile (0.6 mile) from the Willamette River. As such, no fill is proposed within the 35-foot Willamette Greenway setback line. The applicant provides additional findings regarding compliance with this policy on Page 2 of Section 2 Metro Plan of the applicant’s written statement. These findings are incorporated herein by reference.

Willamette Oaks argues that the proposed development is occurring within the Greenway boundary, as shown in the Metro Plan, noting “The Greenway boundary is the only greenway setback depicted in the Metro Plan.” Letter from Zack Mittge at 10 (Dec. 15, 2010). Willamette Oaks does not cite to a specific map or provision of the Metro Plan; however, the Metro Plan diagram does show a Greenway boundary. The hearing official is unsure if this is what Willamette Oaks is referring to. Nevertheless, in the staff report, city staff explained that the “Willamette River Greenway setback” is distinct from the “Willamette River Greenway boundary.” The setback is a subset of the entire Willamette Greenway Boundary. Willamette Oaks incorrectly believes the term “setback” as used in Policy D.11 refers to the boundary depicted in the Metro Plan, but Policy D.11 is not limited to only depictions of the Willamette Greenway found in the Metro Plan. It refers to a setback that other authorities establish.

Willamette Oaks also argues that even if the setback is 35 feet from the top of the riverbank, the proposed transportation improvements fall within that boundary because the improvements are located within the actual river. As discussed above in response to EC 9.8815(2) and below in response to EC 9.4900, the term “river” refers only to the current channel—not to the former mainstem channel.

The remaining Willamette Greenway policies on pages II-D-4 and II-D-5 either provide broad policy direction to the City or are not applicable to this specific application. Based on the available information, the proposal is consistent with the applicable Willamette Greenway policies set out in the Metro Plan. EC 9.8815(3) is satisfied.

Because the proposed transportation improvements are not occurring within the Willamette Greenway setback, an exception to Goal 15 is not required for the proposed facility.

EC 9.8815(4): In areas subject to the Willakenzie Area Plan, the intensification, change of use, or development will conform with that plan’s use management considerations.

The area of the request is within the boundaries of the Willakenzie Plan, an adopted refinement plan that imposes use management requirements consistent with Statewide Goal 15 (see WAP

154–156). The following use management standards (shown in *italics*) apply to development within the Willamette Greenway in the Willakenzie Plan area.

1. *Provisions that all new structures, expansion of existing structures, drives, parking area, or storage areas shall not be permitted within the first 35 feet from the top of the riverbank, unless the location of the floodway boundary requires a greater separation. There are three exceptions to this standard:*
 - a. *Structures designed solely for recreation use (e.g., a deck or steps leading to the river) and driveways for boat landings and water-related or water-dependent uses are permitted within the 35-foot setback.*
 - b. *Public improvements, including pedestrian and bicycle trails, public plazas, and similar amenities, but excluding roads and parking areas, are exempt from the setback requirements specified above.*
 - c. *Structures existing as of the date of adoption of this plan shall be allowed to rebuild at the same distance from the river that they were before destruction by fire, flood or other disaster.*

This standard does not apply to the subject application; the subject site is located is over a half mile (0.6 miles) from the top of the river at its nearest point (see Attachment A) and the proposal does not include improvements within the vicinity of the 35-foot setback.

2. *Provision for public pedestrian and bicycle access along the river.*

This standard does not apply because the proposed development is located more than one-half mile from the river at its closest point and intervening properties are fully developed. Access along the river is already available via the existing riverbank bike path and connecting sidewalks within the existing street system. Again, Willamette Oaks argues that the development would be within the river and thus the applicant must provide bicycle access along the river. Letter from Zack Mittge at 12 (Dec. 15, 2010). The hearing official again concludes that the development would not be within the river as discussed in the findings and conclusions in response to EC 9.4900 below.

3. *Provision that the area within the 35-foot setback area may be included in any density calculation of a project.*

This standard does not apply; as previously noted the subject site is not located within the 35-foot setback.

4. *Continuous building facades and opaque fences or walls exceeding 75 feet in length shall be discouraged within the Greenway to allow for visual access to and from the river.*

Staff stated that this standard does not apply because no buildings, fences, or walls are proposed. Willamette Oaks, however, argued that the application includes walls in excess of 75

feet. Letter from Zack Mittge at 12 (Dec. 15, 2010). The hearing official agrees with Willamette Oaks that there would be walls in excess of 75 feet in length. The applicant is constructing a retaining wall; however, this wall would be in the northeast portion of the project site, facing only a wetland and would not constrain any visual access to and from the river. Additionally, the hearing official notes that this standard uses the term "discourage." There is no restriction against walls exceeding 75 feet in length. The proposed development does not conflict with this standard.

5. *Activities or uses such as open storage of materials shall be discouraged within the greenway.*

As noted by the applicant, no activities or uses for open storage of materials are proposed. Therefore, this standard is not applicable.

6. *Except from small identity and directional signs, business signs shall be oriented away from the river.*

The proposal does not include any business signs. This standard is not applicable.

7. *Significant fish and wildlife habitats, as identified in the adopted Natural Resources Special Study, or Metropolitan Plan Natural Assets and Constraints Working Paper shall be protected. Sites subsequently determined to be significant by the Oregon Department of Fish and Wildlife shall also be protected.*

The Metropolitan Natural Assets and Constraints Working Paper identifies the Willamette River Greenway in Figure J1 and shows the Willamette River as a fish spawning river. The Metropolitan Plan Natural Assets and Constraints Working Paper does not identify any habitat sites on or near the development site. The Delta Ponds adjacent to the right-of-way to the east and Goodpasture Ponds just to the west have been determined to be significant habitat by the Oregon Department of Fish and Wildlife and should be protected.

Protection of this significant habitat is provided through codified protection of Goal 5 resources by the current /WR overlay designation and need to comply with EC 9.4900 et seq. This section states that the purpose of the /WR overlay is to provide conservation of significant riparian areas, wetlands and other water-related wildlife habitat areas included on the City's Goal 5 inventory, and the water quality within these resource areas. Consistent with this policy, the /WR overlay limits uses in the resource areas and conservation setbacks. The Goodpasture wetlands to the west and Delta Ponds wetlands to the southeast are both Goal 5, Category A Wetlands that require a conservation setback of 50 feet from the resource boundary. The Delta Ponds wetlands to the northeast are Category B wetlands that require a conservation setback of 25 feet. As noted below at EC 9.8815(7), which is incorporated herein by reference, the proposed transportation improvements are occurring outside of the adjacent /WR conservation areas and setbacks, assuring their protection.

Willamette Oaks argues that the /WR overlay protections would not protect the wetlands because the proposal does not comply with those provisions. Letter from Zack Mittge at 13 (Dec. 15, 2010). However, as noted below, the hearing official concludes that the proposal does comply with the /WR requirements.

8. *The natural vegetative riparian fringe along the Willamette River, as identified on the Willakenzie Area Plan Natural Resource Area Map, shall be protected and enhanced to the maximum extent practicable.*

As shown on the Willakenzie Area Plan Natural Resource Areas Map (WAP 158), the riparian fringe is located well away from the project area along the edge of the Willamette River. As such, this standard is not applicable.

9. *Scenic qualities and viewpoints, as identified in the Metro Plan Natural Assets and Constraints Working Paper shall be preserved.*

Figure H2, Scenic Areas in the Metropolitan Plan Natural Assets and Constraints Working Paper does not identify scenic qualities or viewpoints on or near the development site.

EC 9.8815(5): In areas not covered by subsection (4) of this section, the intensification, change of use, or development shall conform with the following applicable standards:

The proposed improvements are covered by subsection (4) as they are located within the boundaries of the Willakenzie Area Plan area. This criterion is not applicable.

EC 9.8815(6): When site review approval is required, the proposed development will be consistent with the applicable site review criteria.

The improvements are located completely within existing right-of-way, which is not zoned. Site Review approval is not required in this instance; this criterion is not applicable.

EC 9.8815(7): The proposal complies with all applicable standards explicitly addressed in the application. An approved adjustment to a standard pursuant to provisions beginning at EC 9.8015 of this land use code constitutes compliance with the standard.

The applicant addresses additional standards applicable to this application in Section 04 of the applicant's written statement. The applicable standards are addressed below. The applicant does not request any adjustment and none is required.

EC 9.4900 Water Resource /WR standards

As noted above, the applicant submitted a standards review application for work in the /WR setback which was later withdrawn. A standards review application is required for specific

development to occur in Goal 5 conservation areas. In this case it appears a standards review is not required as no development will take place within the adjacent /WR conservation area.

The area of transportation improvements is adjacent to the Delta Ponds wetlands (WKZ-6 & WKZ-7) to the east and Goodpasture Wetlands (WKB-5) to the west. The Goodpasture Wetlands to the west and Delta Ponds wetlands to the southeast are Category A wetland which require a conservation setback of 50-feet from the resource boundary. The Delta Ponds wetlands to the northeast (WKZ-6) are Category B wetlands, which require a conservation setback of 25 feet. These conservation setbacks are listed in EC 9.4920(2)(b).

EC 9.4920(2)(b) states, "Conservation setbacks are measured horizontally from wetland boundaries established under the 'Goal 5 Locally Significant Wetland Sites Within the Eugene Urban Growth Boundary' map or if provided by the property owner, from the jurisdictional wetland boundary accepted by the Oregon Department of State Lands." MCS Corp. prepared a wetland delineation report (Aug. 2010), which the Oregon Department of State Lands (DSL) reviewed and concurred with (letter from DSL Nov. 8, 2010). The applicant submitted the delineation report to the city as part of its application materials, but did not submit DSL's concurrence. Willamette Oaks submitted DSL's concurrence as part of its Dec. 15, 2010 testimony.

Willamette Oaks seems to make three distinct arguments relating to this criterion.

First, Willamette Oaks argues that the application submittals show construction within conservation setbacks. In its Dec. 15, 2010 letter to the hearing official, Willamette Oaks argued that the applicant's own site plans show that the applicant would be placing a retaining wall structure and fill within a conservation setback. Letter from Zack Mittge at 3-4 (Dec. 15, 2010). In support of its argument, Willamette Oaks cites three maps that the applicant submitted with its application: GP-2, GP-4, and GP-5. These maps show both the Goal 5 resource boundary and the 25-foot setback from that boundary, and the wetland boundary as delineated. Map GP-4 contains a note stating, "25' setback from delineated wetland boundary." This 25-foot setback is the minimum required by EC 9.4929(2)(b). Map GP-5 is a utility placement plan that does not show any wetland delineation or notes concerning where development would be in relation to the wetlands. Map GP-2 contains a note stating, "area of intrusion into 25' setback 810 sf (APPROXIMATELY)." This would appear to be inconsistent with the note on map GP-4, but map GP-2 does not state whether this intrusion is into the setback as measured from the Goal 5 resource boundary or the delineated wetland boundary. The hearing official also observes that map GP-6 shows a "Typical Road Section & Ret. Wall Near Wetland Boundary," which contains a note stating, "setback from wetlands to new wall/roadway construction varies (min. 10.0')." But, again, map GP-6 does not state whether this setback is measured from the Goal 5 resource boundary or the delineated wetland boundary. All of the above evidence relates to the wetland northeast of the development site. Willamette Oaks also pointed to map GP-3 and argued that the applicant has not demonstrated that construction on the west end of the proposed lane widening could be accomplished without impacting wetlands to the northwest. Map GP-3 does not show construction intrusions

into the conservation setback, so there is no evidence supporting Willamette Oak's contention about this western wetland area.

Completing the review of the evidence related to this issue, the hearing official considers the portion of the applicant's written statement that responds to EC 9.4920(2)(b) (Written Statement by Myhre Group at 25). The applicant stated: "The wetland to the east, as shown by the Adopted Goal 5 Resource Inventory Boundary, is located such that the none of the proposed transportation improvements would impact the wetland or enter the wetland buffer." The applicant then referred to map 5 and map GP-1.¹ Map 5 only shows the wetlands; it does not show the proposed development. Map GP-1 shows the wetland delineation and a schematic plan, but no details about the relationship between the proposed development and the wetland. At the hearing on Dec. 15, 2010, Mr. Sowieja (the applicant) stated, "The important note there, [the wetland location information] came from the city's GIS information database and has been placed by our civil engineering team members relative to the existing improvements and so there's radial accuracy related to these locations relative to our improvements. Based on that information and the setbacks established for the various classifications of natural resources that these fall under, our improvements are outside of those setback areas. . . ."² Others in the applicant's team also provided testimony that all development would avoid the conservation setback.

Based on the evidence, the hearing official believes the proposal does avoid the conservation setback as measured from the Goal 5 resource, but as pointed out above, the maps contain either conflicting or insufficiently detailed notes to make this clear. The hearing official thus imposes a condition of approval requiring the applicant to clarify its final maps:

Prior to final approval, the applicant shall clarify its maps showing the conservation setback, including, but not limited to the GP-1-6 series, to show and note that the 25-foot conservation setback is as measured from the Goal 5 resource and not the delineated wetland.

Second, Willamette Oaks argued that the city's Goal 5 Locally Significant Wetland Sites Within the Eugene Urban Growth Boundary map is not detailed enough to provide for a precise delineation of the conservation setback. Letter from Zack Mittge at 2 (Dec. 29, 2010). The staff report contains information tending to show that the information is detailed enough. The staff report stated:

Regarding the accuracy of the applicant's depiction of the wetland boundary, staff notes that the maps adopted with the Goal 5 ordinance were based on the City's GIS data. The applicant used GIS data provided by the City to show the

¹ The applicant also referred to App. G – Standards Review Narrative Responses, but the applicant withdrew the standards review portion of the application, so the hearing official does not consider this referenced document.

² This quote was taken from the recording of the hearing at 20:00–20:29.

resource boundary in determining where the setbacks are. The representation is based on the identical GIS information contained in the adopted maps, but the GIS data was not specifically adopted as part of the implementing ordinance.

A past appeal decision (CI 07-3) addressed the location of Goal 5 boundaries, noting that the (GIS) maps are accurate so long as the map is not at a smaller scale than the original data. With respect to Goal 5 data, the original GIS scale used is 1 inch to 500 feet. While the applicant's site plans are reduced below the 1" to 500' feet scale, staff has also included a map at the 1" to 500' scale (see Attachment B: Goal 5 Setbacks Map) which confirm the accuracy of the applicant's site plans. No standards review is required for this development because all development would occur outside the protected conservation areas.

Attachment B is entitled "Goal 5 Setbacks Map 1" = 500' Scale," and shows conservation setbacks in red and transportation improvements in yellow. The colors do not touch, so based on this map, it appears the proposed development would avoid the conservation setbacks (although the hearing official notes that the map states that it is based on imprecise source data and is for general reference only).

Third, and last, Willamette Oaks argued at the hearing that once the applicant conducts a wetland delineation, and receives DSL concurrence, it cannot step back and choose to use the city's map. Willamette Oaks did not argue this point in its Dec. 15 or Dec. 29 submittals, but seemed to make this argument in its Jan. 5, 2011 letter. Letter from Zack Mittge at 4 (Jan. 5, 2011). Conceptually, Willamette Oaks' argument makes sense—that is, when there is more specific and recent wetland information, the applicant should use that information in place of the city map—but that is not what the Eugene Code says. There is no restriction in the Eugene Code requiring an applicant to use a wetland determination that it prepares. EC 9.4920(2)(b) states that the distances are measured from wetland boundaries as determined by the city's "Goal 5 Locally Significant Wetland Sites Within the Eugene Urban Growth Boundary" map, or a jurisdictional wetland boundary accepted by the Oregon Department of State Lands.

The Planning Commission described the process for delineating a Goal 5 / WR Site boundary in the Alder Woods PUD, No. PDT 07-5 & SDR 08-2 (Nov. 3, 2008), decision. On page 7 of that decision, the Planning Commission stated:

The Planning Commission finds that the correct process for delineating the Goal 5 / WR Site boundary is to:

- a) Begin with a generalized delineation of the /WR Site boundary based on the applicable map of "Significant Goal 5 Riparian Corridors and Wildlife Habitat Site" in Section III of the Goal 5 Water Resources Conservation Plan.
- b) If the delineation of the /WR Site boundary under (a) is not precise enough to determine compliance with applicable criteria and standard or is otherwise

unsatisfactory, the next step is to arrive at a more precise depiction of the resource site boundary

It is not clear to the hearing official whether this Alder Woods PUD decision is referring to the /WR Water Resources Conservation Overlay Zone generally, or to a specific subsection within the /WR section of the Eugene Code. Ultimately, that is not important. It refers to the /WR section generally, thus it is precedent for the hearing official to follow. If it refers to a different subsection than EC 9.4920(2)(b), then it provides context—or more specifically, a process in an analogous situation, that the hearing official should also follow. Based on the text of EC 9.4920(2)(b) and this prior Planning Commission decision, the hearing official denies Willamette Oak's legal argument that the hearing official must use the MCS wetland delineation report.

EC 9.6500 Public Improvement Standards

EC 9.6505 Improvements-Specifications, requires that all public improvements be designed and constructed in accordance with adopted plans and policies, the procedures specified in EC Chapter 7 and standards and specifications adopted pursuant to EC Chapter 7. The applicant addresses these standards on page 1-4 of Section 04 of the written statement showing conceptual compliance subject to more detailed review as part of the PEPI process. In order to ensure compliance with EC 9.6505, the following condition is warranted:

An Engineering and Construction agreement is required for the private construction of public improvements and must be submitted when the construction plans are submitted for review and approval. The configuration and size of the public improvements shall further be subject to approval by the City Engineer upon review of the design and supporting analysis prepared by the applicant's engineer.

In regards to EC 9.6505(1) Water Supply and EC 9.6505(2) Sewage as there is no new water or wastewater sewage on the subject site, therefore these criteria are not applicable.

EC 9.6505(3) Streets and Alleys, requires all streets to be paved to the width specified in EC 9.6870, and improved according to adopted standards and specifications pursuant to EC Chapter 7. The proposed improvements to Goodpasture Island Road, a minor arterial, meet the width specified in EC 9.6870. Table 9.6870 shows a paving width of 46' to 70' feet for a minor arterial. As shown on Exhibit 2 the proposed widening will result in a paving width of 55.4 feet. As noted in the condition above, compliance with Chapter 7 standards will be subject to further review and approval at the time of the PEPI.

Regarding EC 9.6505(4) Sidewalks and (5) Bicycle Paths and Accessways, all sidewalks and bicycle paths and accessways to improved according to adopted standards and specifications pursuant to EC Chapter 7. As conditioned above, compliance with Chapter 7 standards for this portion of the public improvements will be subject to additional review through the PEPI process.

Based on the above findings, conditions, and future permit requirements noted, the proposal is consistent with applicable standards.

EC 9.6706 Development in Flood Plains through EC 9.6709 Special Flood Hazard Areas - Standards

These standards do not apply because the subject property is not located within any of these designations, per the Federal Emergency Management Agency's (FEMA) Flood Insurance Rate Map (FIRM) 41039C1128F.

EC 9.6710 Geological and Geotechnical Analysis

As required at EC 9.6710(5), the applicant submitted a Level 2 geotechnical analysis dated 6/23/2010, prepared by K&A Engineering Inc., which provided the required analysis of site characteristics, sub-surface investigation, and recommendations for design and construction, consistent with these standards. The analysis recommended site stripping and compaction in preparation for the bridge foundation. It then recommended either cast piles or micro piles as foundation structures. Public Works staff concurred with this initial geotechnical assessment. Adherence to the report recommendations (or subsequent recommendations resulting from the new information submitted during this permit process) will be required during subsequent PEPI permit process.

At the hearing, Gunnar Schlieder of GeoScience, Inc., presented testimony regarding the applicant's geotechnical analysis on behalf of Willamette Oaks. GeoScience followed this oral presentation with a letter dated Dec. 29, 2010. K&A Engineering, the applicant's engineering firm, responded to each point in a Jan 5, 2011 letter, explaining why it conducted the analysis in the manner it did and why it believes its interpretations of the data are correct.

The hearing official is satisfied that the applicant's geotechnical analysis is complete. As noted above, city staff concurred with the assessment. GeoScience presents a professional difference in opinion about how K&A Engineering conducted the analysis, alternative conclusions about some of the data, and stark disagreement with conclusions about the data. The hearing official is not in a position to decide that one professional's methodology and interpretation of the geotechnical data is more correct or believable than the other. Here, K&A Engineering has explained the basis of the methods and conclusions in response to the issues that GeoScience raised. The hearing official concludes that the applicant's geotechnical analysis satisfies EC 9.6710.

EC 9.6725 Outdoor Lighting Standards

While the applicant addresses lighting standards in the written statement, there is insufficient information provided to ensure compliance with this standard. It is noted per EC 9.6725(5) public streetlights constructed to Chapter 7 standards and specifications are exempted from

the lighting standards. If lighting other than public streetlights is proposed, compliance with City of Eugene outdoor lighting standards will otherwise be required during the PEPI review process.

EC 9.6780 Vision Clearance Area

The proposed transportation improvements will provide vision clearance areas at corners and sightlines as required by ODOT and AASHTO. Specific designs will be subject to further review or approval during the PEPI review process per the requirements of the Eugene Code. This criterion is met.

EC 9.6791 through EC 9.6797 Stormwater Management

In regards to EC 9.6791 Stormwater Destination, the applicant's proposal will have separate destinations for runoff generated on the west and east side improvements. The discharge will be into existing grassy areas located in the "clover" areas of the interchange (under Lane County jurisdiction) or through existing culvert outfalls to the east of the development. Public Works staff confirms that the proposal conceptually meets destination requirements, subject to further review through the PEPI and Lane County's Facilities Permit processes.

Regarding EC 9.6792 Stormwater Pollution Reduction, the applicant's proposal includes stormwater treatment for all of the newly created impervious areas and drainage patterns will follow existing conditions. Methods of pre-treatment include curb inlet sumps/traps and mechanical treatment systems such as Contech's StormFilter to fully treat the stormwater prior to its release into the adjacent wetland. Specific designs demonstrating compliance will be provided during the PEPI review process per the requirements of the Eugene Code. The standards of EC 9.6793 through EC 9.6796 do not apply to this application.

In regards to EC 9.6797 Stormwater Operation and Maintenance, the proposed stormwater improvements will be publicly maintained. An Operations and Maintenance agreement as required by EC 9.6797(3)(d) shall be required as part of the PEPI process. To ensure compliance the following condition of approval is warranted:

An Operations and Maintenance Agreement for the applicant's proposed stormwater facilities, per the City's Stormwater Management Manual, is required during the PEPI permit process.

While the applicant includes other standards in the written statement, many are not applicable or will be addressed in the future as part of subsequent permitting requirements. To the extent they might be considered applicable to this application, the applicant's findings on pages 1-25 are incorporated by reference. Compliance will be confirmed during subsequent PEPI permit review as conditioned.

Issues Raised by Willamette Oaks Not Related to Willamette River Greenway Permit Criteria

EC 9.7010: Signature of Property Owner

Willamette Oaks argued that the application should be denied because the applicant improperly applied for a Greenway Permit for property that it does not own. Specifically, Willamette Oaks cites to EC 9.7010 and ORS 227.175(1). Letter from Zack Mittge (Dec. 15, 2010). To start, ORS 227.175(1) does not require that a property owner sign a land use application. That section only authorizes an owner of land to apply for a permit or zone change. It does not require the signature of the property owner when another person desires to apply for a permit or zone change.

However, EC 9.7010 requires, "Applications shall . . . be signed by the property owner, unless the applicant is a public agency, in which case the signature of the property owner is not required." This is a mandatory requirement for land use applications such as the current Greenway Permit request. Here, city staff stated that Lane County owns the Delta Park ROW in fee title and transferred jurisdictional authority over Goodpasture Island Road to the City of Eugene, which has an easement for roadway purposes through and over Delta Highway to maintain and operate Goodpasture Island Road. Memo from Steve Ochs (Dec. 29, 2010). While helpful, Willamette Oaks correctly stated in its rebuttal that this does not describe whether the city jurisdiction extends only to the existing bridge. Letter from Zack Mittge (Jan. 5, 2011).

In response, the applicant moved to reopen the record to submit authorizations from the City of Eugene and Lane County for the applicant to make the this application. The applicant submitted a letter from Mark Schoening, City Engineer, which stated that Mr. Schoening has authority to authorize the applicant to submit the application pursuant to EC 9.7010 and authorizes the applicant to make the subject application. Similarly, The applicant submitted a letter from Liane Richardson, Acting County Administrator and Marsha Miller, Director, Public Works, which stated that Ms. Richardson and Ms. Miller have authority to authorize the applicant to submit the application pursuant to EC 9.7010 and authorizes the applicant to make the subject application. The applicant submitted a map from Lane County and a survey from Baker and Associates in support of these authorizations.

Not surprisingly, Willamette Oaks argued that the authorizations are insufficient for several reasons, all of which boil down to one point—the record does not contain the trail of delegation from the City Council and County Board of Commissioners down to the persons who signed the authorizations. Willamette Oaks cited various charter provisions and state statutes. In rebuttal, the applicant cited other charter provisions and state statutes. In short, the hearing official accepts the letters from these high-level persons who signed the authorizations and asserted that they have authority to make such authorizations. The hearing official does not believe the level of information that Willamette Oaks asserts is necessary in the record. By comparison, if a private party owned the subject land in fee title with no other interests, the level of information that Willamette Oaks argues is needed would equate to a title report

showing the current owner of the land,³ the signature of that owner, and something (perhaps a notary?) showing that the person who signed the application is actually the person whose name appears on the title report. EC 9.7010 simply does not require this level of information. It requires a signature. The applicant received the needed signatures from the city and county officials who assert they have authority to provide the signatures. The application complies with EC 9.7010.

Even without the authorization letters at this time, the hearing official would not have denied the application for failure to comply with EC 9.7010. EC 9.7000 et seq. does not specify a remedy for failing to have the property owner's signature on the application. Willamette Oaks cited *Johnston v. City of Albany*, 34 Or LUBA 32 (1998). *Johnston* presents a very different situation; there the applicant proposed to use a portion of a parcel that was subject to an agreement giving the Klinefelters exclusive control and possession until a specific contingency occurred. The Klinefelters did more than just not consent to the application—they objected to the application. Here, there is nothing in the record showing any objection from the city or county. The hearing official would not have concluded that the lack of consent to the application would be similarly fatal, but would have imposed a condition of approval requiring consent by the City of Eugene and Lane County.

TransPlan Precludes the Proposed Transportation Facility

Willamette Oaks argues that the proposed bridge and additional lanes do not appear within the City's Transportation System Plan, and thus conflict with the plan. Letter from Zack Mittge (Dec. 15, 2010). City staff correctly responded to this argument by noting that the approved tentative PUD (PDT 09-1) and zone change (Z 09-6) (approved by the Hearing Official and Planning Commission on appeal) concluded that the proposed bridge and additional lanes are consistent with the Transportation System Plan. The proposed bridge and additional lanes have not changed functionally; there is no factual or legal basis to revisit this prior conclusion.

Designation of the Area as "Parks and Open Space"

Willamette Oaks argues that the subject property where the bridge and additional lanes would be constructed is designated in the Metro Plan and Willakenzie Area Plan as open space, and the proposed bridge and additional lanes are not allowed in this area. Willamette Oaks also argues Goal 15 (provision F.2.c) requires open space zoning of all open space areas. Letter from Zack Mittge (Dec. 15, 2010).

The Metro Plan diagram does show this area in dark green, the plan notes that this diagram is a "generalized map and graphic"; however, the plan text states that it is drawn at a "metropolitan scale, necessitating supplementary planning on a local level"; and the land use designations shown the diagram "provide direction for decisions pertaining to appropriate

³ Indeed, in rebuttal, the applicant provided a copy of the deeds that were noted on the Baker and Associates survey.

reuse (redevelopment), urbanization of vacant parcels, and additional use of underdeveloped parcels." *Metro Plan* II-G-1, II-G-2. These statements indicate that it is necessary to look at the refinement plan and zoning map to determine if the Delta Highway right-of-way is subject to Metro Plan open space policies. If the refinement plan and zoning map apply to the Delta Highway right-of-way, then it would be appropriate to apply Metro Plan policies.

The Willakenzie Area Plan (WAP) land use diagram (see map following page 19 in the WAP) shows the area of the proposed development in dark green, corresponding to a Parks/Open Space designation. However, Land Use Finding No. 4 (WAP p. 10) states that the WAP study area excludes streets and alleys. The plan text thus indicates that the Delta Highway right-of-way is not subject to the plan policies.

City staff stated that the land is not zoned open space, rather it is not zoned. Memo from Steve Ochs (Dec. 29, 2010).

Finally, because the project area is already used as the Delta Highway and Goodpasture Island Road overpass, Goal 15 does not require open space zoning for the project area.

Willamette Oaks' argument that transportation improvements are prohibited within the existing Delta Highway right-of-way has no basis in state law, the Metro Plan, or Eugene Code.

Decision

Based on the application information and materials, other evidence described in this report, and the findings and conclusions contained in this report, Hearing Official APPROVES the Willamette Greenway Permit, subject to the conditions of approval listed below. The applicant is cautioned that the conditions of approval below differ from the conditions contained in the staff recommendation.

1. Prior to final approval, the applicant shall clarify its maps showing the conservation setback, including, but not limited to the GP-1-6 series, to show and note that the 25-foot conservation setback is as measured from the Goal 5 resource and not the delineated wetland.
2. An Engineering and Construction agreement is required for the private construction of public improvements and must be submitted when the construction plans are submitted for review and approval. The configuration and size of the public improvements shall further be subject to approval by the City Engineer upon review of the design and supporting analysis prepared by the applicant's engineer.

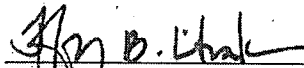
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3. An Operations and Maintenance Agreement for the applicant's proposed stormwater facilities, per the City's Stormwater Management Manual, is required during the PEPI permit process.

Dated this 24 day of February 2011.

Mailed this 25 day of February 2011.



Jeffrey B. Litwak
Hearings Official

SEE NOTICE OF HEARING OFFICIAL DECISION FOR STATEMENT OF APPEAL RIGHTS

D. Willamette River Greenway, River Corridors, and Waterways Element

The Willamette River has long been recognized in the Eugene-Springfield area as a valuable natural asset. A number of policy documents and programs adopted by local jurisdictions have reinforced the community concern to preserve and protect metropolitan river corridors.

On December 6, 1975, the Land Conservation and Development Commission (LCDC) adopted Statewide Planning Goal 15: Willamette River Greenway. The goal sets forth the overall framework within which state and local governments carry out protection and maintenance of the Willamette River Greenway.

The goal requires Eugene, Springfield, and Lane County to adopt Greenway boundaries, to specify uses permitted within those boundaries, and indicate areas of potential acquisition along the Greenway. In making these determinations, local jurisdictions must gather information and inventory the nature and extent of all natural resources associated with the Willamette River Greenway. Local jurisdictions are also mandated to adopt provisions, by ordinance, requiring a compatibility review permit for any intensification, change of use, or development within Greenway boundaries. The jurisdictional area of the *Metro Plan* (i.e., Metro Plan Boundary) was found to be in compliance with Goal 15 on September 12, 1982.

In the metropolitan area, a large portion of land within the Greenway is in public ownership or public parks such as Mount Pisgah, Skinner's Butte, Alton Baker, and Island Park. Future proposed park acquisitions, such as the Goodpasture Island gravel ponds, will further expand the opportunity for public access and enjoyment of the river area. The three jurisdictions cooperated in the development of a bicycle-pedestrian trail system that extends along the Greenway from south of Springfield to north of Eugene and into the River Road area. This system includes five bike bridges across the river.

Land along the Greenway in private ownership is in a variety of uses, some of which appear to provide greater opportunity than others for public access and enjoyment. Residential uses along the Greenway can provide the residents with access to the river area. Certain commercial uses, such as restaurants, can allow customers visual enjoyment of the Greenway. Other uses, such as the many industrial uses, would appear to provide little if any opportunity for access or enjoyment of the Greenway. This is evidenced by much of the existing industrial development along the Willamette River in the Glenwood area.

Finally, in rural agricultural areas, isolated access points can work to the detriment of the Greenway program. In these areas, trespass and vandalism can cause a detraction in the general Greenway environment and create problems for private landowners.

The Greenway boundaries, as adopted by the three jurisdictions, have been digitized in the Regional Land Information Database (RLID) and are shown as an overlay on Plan Diagram. Future acquisition areas and uses allowed within the Greenway remain the primary responsibility of the local jurisdictions. This element, however, provides the basis for a coordinated effort by Eugene, Springfield, and Lane County.

The statewide Greenway goal specifically applies to the Willamette River. In the Eugene-Springfield area, portions of the McKenzie River share equal importance as a natural resource worthy of conservation and protection. Additionally, the metropolitan network of waterways and associated creeks and drainageways are important features in the metropolitan area, with potential as part of an areawide waterways system. For that reason, while this element must specifically cover the Willamette River Greenway, it is important to consider the McKenzie River, where it is situated within the area of the *Metro Plan* and the inland system of waterway corridors connecting various parts of Springfield, Eugene, and Lane County to one another.

Goal

To protect, conserve, and enhance the natural, scenic, environmental, and economic qualities of river and waterway corridors.

Findings, Objectives, and Policies

Findings

1. The Willamette and McKenzie Rivers are recognized as valuable natural assets to the entire community.
2. In addition to the Willamette and McKenzie Rivers, a number of waterways are important environmental features in the metropolitan area. These include, for example, the Springfield Millrace, Amazon Creek, Fern Ridge Reservoir, and the Eugene Millrace.
3. Recently, the community has begun to realize the potential of inland waterway corridors to contribute to the livability of the area.
4. In addition to its significance to agriculture, flood control, and fish and wildlife, Fern Ridge Reservoir continues to grow in importance as a recreational water facility.
5. Statewide Planning Goal 15 mandates local governments to establish the Greenway boundaries, allowed uses within the Greenway and potential acquisition areas.
6. Eugene, Springfield, and Lane County have received final Greenway boundary approval by the LCDC.
7. The jurisdictional area of the *Metro Plan* was found to be in compliance with Goal 15 on September 12, 1982.

8. The following permits are required by Eugene, Springfield, and Lane County to implement Statewide Planning Goal 15 within their respective areas of jurisdiction as defined in Chapter II-D:
 - a. The City of Eugene requires Greenway Permits for any activity in the Willamette Greenway involving intensification of use, change in use, or development.
 - b. The City of Springfield requires a Discretionary Use Permit for any change or intensification of use, or construction that has a significant visual impact in the Willamette Greenway Overlay District, which is combined with a “Greenway Setback Line.”
 - c. Lane County requires a Greenway Development Permit for intensification or change of use or development allowed in applicable zones, including public improvements and including partitions and subdivisions as defined in LC 13.020 for lands within the boundaries of the Willamette River Greenway.
9. Local jurisdictions retain the primary responsibility for implementation of the Willamette River Greenway goal.
10. The metropolitan area’s river and waterway corridors require protection to maintain and enhance natural, scenic, environmental, and economic qualities of these waterways.
11. The three jurisdictions have cooperatively developed a public park system and bicycle-pedestrian trails along the Willamette River Greenway.
12. Residential and commercial development along the Willamette River Greenway provides greater opportunity for public access and enjoyment of the river area than does industrial development.
13. Rural agricultural areas along river and waterway corridors can be damaged by isolated public access points because of vandalism and/or trespass on private lands.
14. Experience in other communities indicates that carefully planned and designed residential and commercial development at designated locations along inland water corridors can be compatible with adjacent areas and the corridors themselves.
15. The current unpleasant and unsightly condition of many inland waterway systems results from neglect and uncoordinated waterway planning.

Objectives

1. Encourage use of river and waterway corridors to fulfill open space, recreation, and resource protection needs.

2. Ensure that development occurring within river and waterway corridors is responsive to and provides protection of these valuable natural assets.
3. Encourage, where appropriate and in keeping with Greenway goals, development that respects the quality of rivers and waterways and provides a variety of opportunities for enjoyment of those resources by the public.
4. Encourage coordinated water planning and the development of the area's waterways, where appropriate, as part of the area's open space and park system.

Policies

- D.1 Periodically, local governments shall review Greenway boundaries, uses, and potential acquisition areas to ensure continued compliance with state and local Greenway goals.
- D.2 Land use regulations and acquisition programs along river corridors and waterways shall take into account all the concerns and needs of the community, including recreation, resource, and wildlife protection; enhancement of river corridor and waterway environments; potential for supporting non-automobile transportation; opportunities for residential development; and other compatible uses.
- D.3 Eugene, Springfield, and Lane County shall continue to cooperate in expanding water-related parks and other facilities, where appropriate, that allow access to and enjoyment of river and waterway corridors.
- D.4 Lane County, Springfield, and Eugene shall continue to participate in efforts to determine the feasibility of an urban canal that would connect Eugene's historic Millrace to Amazon Creek. Likewise, Springfield's efforts to improve the scenic quality of its Millrace should be encouraged.
- D.5 New development that locates along river corridors and waterways shall be limited to uses that are compatible with the natural, scenic, and environmental qualities of those water features.
- D.6 New industrial development that locates along the Willamette and McKenzie Rivers shall enhance natural, scenic, and environmental qualities.
- D.7 Potential public access points in rural agricultural areas shall be carefully reviewed to ensure preservation of the Willamette River Greenway environment, with special emphasis on problems of vandalism and trespass.
- D.8 Within the framework of mandatory statewide planning goals, local Willamette River Greenway plans shall allow a variety of means for public enjoyment of the river, including public acquisition areas, residential areas, and commercial areas.

- D.9 Local and state governments shall continue to provide adequate public access to the Willamette River Greenway.
- D.10 Aggregate extraction may be permitted when compatible with purposes of Statewide Planning Goal 15. Local governments shall continue, through land use planning and special regulations, to control aggregate extraction to minimize adverse effects of extraction on water quality, fish and wildlife, vegetation, bank stabilization, stream flow, scenic quality, noise, and safety.
- D.11 The taking of an exception shall be required if a non-water-dependent transportation facility requires placing of fill within the Willamette River Greenway setback.

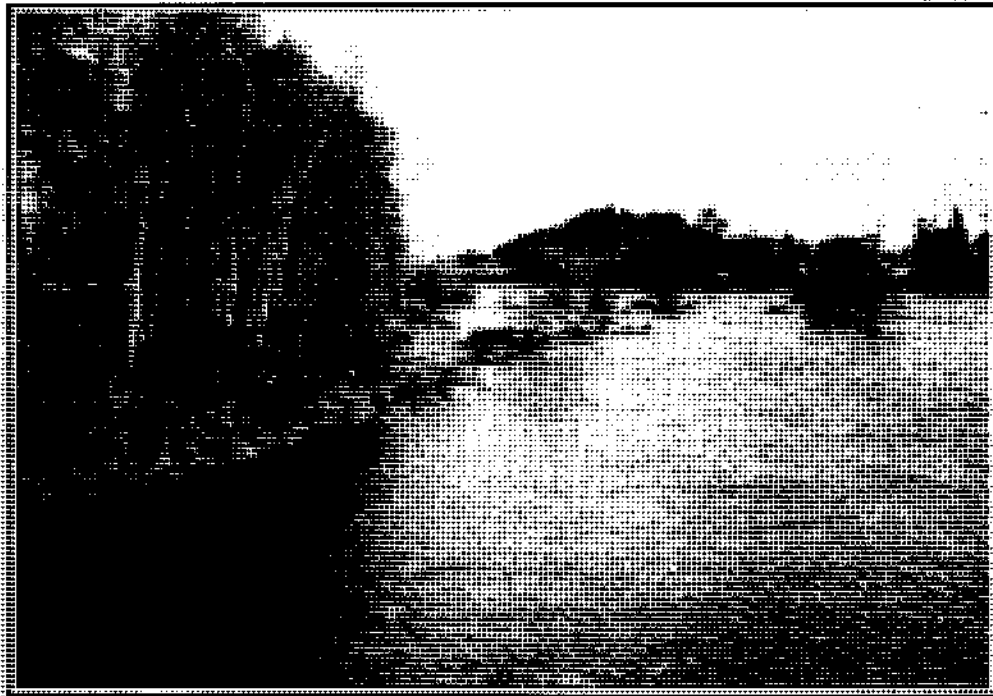
An exception to Statewide Planning Goal 15 Willamette River Greenway was approved for Oregon Department of Transportation (ODOT) for purposes of removing and replacing the decommissioned I-5 Bridge, the temporary detour bridge and the Canoe Canal bridge with two new parallel bridges (one southbound and one northbound) within the I-5 right-of-way crossing the Willamette River and Canoe Canal and within the Willamette River Greenway Setback Line. The exception authorizes construction and later removal of one or more temporary work bridges; demolition of the decommissioned I-5 Willamette River Bridge, Canoe Canal Bridge, and detour bridges; construction of the two replacement bridges; reconstruction of the roadway approaches to the bridges (I-5 and ramps); rehabilitation of the project area; and completion of any required mitigation of project impacts. In association with these tasks, the exception further authorizes within the Willamette River Greenway Setback Line the addition and removal of fill within ODOT right-of-way and the removal of fill within a temporary slope easement east of I-5. This exception satisfies the criteria of Oregon Administrative Rule (OAR) 660-004-0022(6) Willamette Greenway and the exception requirements of OAR 660-004-0020 Goal 2, Part II (c) for a "reasons" exception, and pursuant to OAR 660-004-0015, is hereby adopted as an amendment to the *Metro Plan* text, Policy D.11, Chapter III, Section D.

An exception to Statewide Planning Goal 15 Willamette River Greenway was approved by the cities of Eugene and Springfield and by Lane County authorizing construction of a bike path viaduct beneath the I-5 bridges, along the south bank of the Willamette River. The exception authorizes construction of the bike path viaduct including the fill and removal of fill necessary to build the structure. This exception satisfies the criteria of Oregon Administrative Rules (OAR) 660-004-0022 (6) Willamette Greenway and the exception requirements of OAR 660-004-0020 Goal 2, Part II (c) for a "reasons" exception. Pursuant to OAR 660-004-0015, this exception is hereby adopted as an amendment to the *Metro Plan* text, Policy D.11, Chapter III, Section D.

III-D-6
Replaced December 31, 2009

WILLAMETTE GREENWAY

There are approximately six linear miles within the Willakenzie area that are within the boundaries of the Willamette River Greenway. In the Willakenzie area, the greenway is under both public and private ownership. The area under public ownership composes primarily Alton Baker Park and the Delta Ponds. The area of the greenway that is privately owned includes Valley River Center, a variety of other commercial developments in the Valley River Center area, and residentially zoned lands along Goodpasture Island Road. Development of lands within the Willamette Greenway is subject to direction provided within the Statewide Planning Goals and the City's zoning ordinance. Greenway development criteria such as access to and along the river, preservation of riparian vegetation, and provision of landscaping buffering between the use and the river are some of the factors considered in review of development in the greenway.



Willamette River and Greenway.

There is still a significant portion of land within the greenway in the Willakenzie area that is undeveloped. Development within the greenway is reviewed by the City through either the conditional use permit process or the planned unit development process. Within the next five years, the City of Eugene will be undertaking a Greenway Management Plan which will address how development is to occur within greenways throughout the city. The following use management standards are consistent with Statewide Land Use Goal 15 and shall apply to development within the Greenway in the Willakenzie area.

1. Provision that all new structures, expansion of existing structures, drives, parking areas, or storage areas shall not be permitted within the first 35 feet back from the top of the riverbank, unless the location of the floodway boundary requires a greater separation. There are three exceptions to this standard:
 - A. Structures designed solely for recreation use (e.g., a deck or steps leading to the river) and driveways for boat landings and water-related or water-dependent uses are permitted within the 35-foot setback.
 - B. Public improvements, including pedestrian and bicycle trails, public plazas, and similar amenities, but excluding roads and parking areas, are exempt from the setback requirements specified above.
 - C. Structures existing as of the date of adoption of this plan shall be allowed to rebuild at the same distance from the river that they were before destruction by fire, flood, or other disaster.
2. Provision for public pedestrian and bicycle access along the river.
3. Provision that the area within the 35-foot setback area may be included in any density calculation of a project.
4. Continuous building facades and opaque fences or walls exceeding 75 feet in length shall be discouraged within the greenway to allow for visual access to and from the river.
5. Activities or uses such as open storage of materials shall be discouraged within the greenway.
6. Except from small identity and directional signs, business signs shall be oriented away from the river.
7. Significant fish and wildlife habitats, as identified in the adopted Natural Resources Special Study, or Metropolitan Plan Natural Assets and Constraints Working Paper shall be protected. Sites subsequently determined to be significant by the Oregon Department of Fish and Wildlife shall also be protected.
- B. The natural vegetative riparian fringe along the Willamette River, as identified on the Willakenzie Area Plan Natural Resource Area Map, shall be protected and enhanced to the maximum extent practicable.

9. Scenic qualities and viewpoints, as identified in the Metro Plan Natural Assets and Constraints Working Paper shall be preserved.